Supreme Court, U.S.
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No. 07-890

In The
Supreme Court of the United States

ARE ACQUISITIONS, LLC,

Petitioner,

v.

MICHAEL G. HANNA, JR., PETER NARDIN, JONATHAN SWINDLE, RICHARD COX, CHARLES LINDSAY, CHARLES DUBROFF, and DAVID FOX,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the cradle to grave system for managing hazardous waste under the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, creates a duty for a tenant to manage hazardous wastes that it has generated at its leasehold safely and in compliance with the law, including the duty not to abandon hazardous wastes in a leased building at the conclusion of a leasehold without complying with the requirements of RCRA.

PARTIES TO THE PROCEEDING

ARE Acquisitions, LLC, is Petitioner in this Court and was the respondent and cross-petitioner before the Court of Appeals of Maryland, the appellant in the Court of Special Appeals of Maryland and plaintiff in the Circuit Court for Montgomery County, Maryland. Michael G. Hanna, Jr., Peter Nardin, Jonathan Swindle, Richard Cox, Charles Lindsay, Charles Dubroff and David Fox are Respondents in this Court and were petitioners in the Court of Appeals of Maryland, the appellee in the Court of Special Appeals of Maryland and defendants in the Maryland Circuit Court.

CORPORATE DISCLOSURE STATEMENT

Alexandria Real Estate Equities, Inc., a publicly traded real estate investment trust, has a 1% managing member interest (through a wholly owned subsidiary) and a 99% non-managing member interest in Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of *certiorari* to review the judgment of the Court of Appeals of Maryland denying a petition for a writ of certiorari to review the action of the Court of Special Appeals of Maryland dismissing Petitioner's claim of negligence and denying Petitioner's motion for reconsideration of that act after reversing the Court of Special Appeals and dismissing all of Petitioner's remaining claims against Respondents.

OPINIONS BELOW

The following orders and opinions are reproduced in the Appendix hereto:

The August 24, 2006 unreported opinion of the Court of Special Appeals of Maryland affirming dismissal of Petitioner's negligence claim (App. 1-44);

The July 22, 2004 order of the Circuit Court of Maryland for Montgomery County dismissing Petitioner's negligence claim (App. 45-48);

The orders of the Court of Appeals of Maryland denying Petitioner's conditional cross-petition for writ of certiorari (App. 49-52) and denying Petitioner's motion for reconsideration (App. 53).

JURISDICTION

The Court of Appeals of Maryland denied Petitioner's conditional cross-petition for writ of *certiorari* on December 6, 2006. Pursuant to Md. Rule 8-605, which permits reconsideration only of "a decision by the Court that disposes of the appeal," Petitioner was required to wait until the Court of Appeals issued its August 22, 2007 opinion before requesting reconsideration. Petitioner timely filed a motion for reconsideration on September 20, 2007, which was denied by the Court of Appeals on September 27, 2007.

This petition for writ of certiorari is filed within 90 days of the date of the Court of Appeals' denial of the Petitioner's motion for reconsideration pursuant to 28 U.S.C. § 2101(c) and SUP. CT. R. 13.3. This Court has jurisdiction to review on a writ of *certiorari* the Court of Appeals of Maryland's judgment pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The relevant statutory provisions of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, and the regulations promulgated thereunder, are set forth in the Appendix hereto at App. 54-77.

STATEMENT

Petitioner, ARE Acquisitions LLC ("ARE" or "Petitioner") seeks review of the decisions of the Court of Appeals of Maryland denying (1) ARE's cross-petition for certiorari from a decision of the Court of Special Appeals dismissing ARE's claim for negligence against Respondents on the basis of a determination that a tenant owed no duty to its landlord to handle its hazardous and radioactive wastes safely and in accordance with the law, and (2) ARE's petition for reconsideration of that denial after the Court of Appeals disposed of Petitioners' remaining claims against Respondents. The opinions below, on their face, read as if this were a routine decision on a matter of state negligence law in a case where a disgruntled landlord is attempting to avoid the consequence of a former tenant's bankruptcy. However, the decision that a tenant can abandon materials constituting hazardous and radioactive waste and owes no legal duty to manage those wastes in accordance with the requirements of the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, stands in stark conflict with decisions of several courts of appeals that have affirmed criminal convictions and civil liability premised on the opposite proposition. Parties who generate hazardous waste have a clear obligation to comply with the cradle-to-grave program that Congress created in RCRA for the handling of hazardous waste. The fact that, months after abandonment, a company files a petition in bankruptcy does not and should not excuse

either the company or its officers from their obligations to handle the waste in accordance with the law. Given the importance attached by Congress to the proper handling of hazardous waste, *see* 42 U.S.C. § 6902(b), this Court should grant the petition for certiorari, because the Maryland Court of Appeals "has decided an important federal question in a way that conflicts with the decision . . . of a United States court of appeals." SUP. CT. R. 10(b).

A. Statutory Background

The federal Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, is a comprehensive environmental statute that governs the treatment, storage and disposal of solid and hazardous waste. *See City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 331-332 (1994). RCRA's primary purpose is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, "so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b). RCRA imposes significant obligations on generators of hazardous waste in their handling and disposal of such waste and provides for stringent penalties, including criminal penalties, for the violation of its provisions. 42 U.S.C. § 6928(d), (e). RCRA imposes strict liability upon "any person" who is contributing or who has contributed to the disposal of hazardous substances that may present an imminent and substantial endangerment to health or the environment. 42

U.S.C. § 6973(a). As defined by statute, the term "person" includes both individuals and corporations and does not exclude corporate officers and employees. 42 U.S.C. § 6903(15).

RCRA defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material. . . ." 42 U.S.C. § 6903(27). The regulations promulgated under RCRA define "discarded material" as any material which is abandoned by being disposed of, burned or incinerated or accumulated, stored or treated before or in lieu of being abandoned by being disposed of, burned, or incinerated. 40 C.F.R. § 261.2(a), (b). Under RCRA, "hazardous waste" is a subset of "solid waste" that, for enumerated reasons, creates public health and environmental dangers. 42 U.S.C. § 6903(5). Hazardous waste must be labeled, contained, and properly stored while awaiting transportation to a permitted treatment, storage, or disposal facility. 42 U.S.C. § 6922(a); 40 C.F.R. § 262.34.

RCRA provides for certain private causes of action by citizens against violators of RCRA. 42 U.S.C. § 6972. Section 7002(a)(1)(B) of RCRA authorizes citizens to bring a private cause of action against any person who causes or contributes to conditions which "may present an imminent and substantial endangerment to health or the environment" due to the disposal of a RCRA solid or hazardous waste. 42 U.S.C. § 6972(a)(1)(B). In addition, Section 7002(a)(1)(A) of RCRA authorizes citizens to bring a suit for injunctive

relief against persons who are "alleged to be in violation" of a permit, standard or the requirements under RCRA. 42 U.S.C. § 6972(a)(1)(A). RCRA does not provide its own private federal right of action for damages, *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996); damages must be sought under state law or the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675. *See* 42 U.S.C. § 9613(f)(1) (providing that "any person may seek contribution from any other person who is liable or potentially liable" for cleanup costs under CERCLA).

B. Factual Background

Intracel Corporation ("Intracel") is a biotechnology company that leased laboratory and office space from Petitioner ARE in Rockville, Maryland (the "Premises") until the end of April 2001. Intracel's operations at the Premises involved the use of hazardous materials, including biological agents, radioactive materials and various chemicals. Intracel was regulated as a generator of hazardous waste under RCRA and, as such, was permitted to store hazardous waste at the Premises for limited periods of time so long as it complied with regulations regarding the proper handling and storage of the waste. Intracel also had a license conditionally authorizing its use of radioactive materials. After ARE terminated Intracel's lease for failure to pay rent, Intracel moved out and left huge amounts of material in ARE's building, including tons of low-level radioactive

waste, tons of chemically hazardous waste, tons of biomedical waste, and enough trash to fill seventeen dumpsters. This material was not appropriately labeled, segregated, or contained in compliance with law. Despite repeated efforts to get Intracel to return to clean up the property in May and June 2001, Intracel refused, requiring ARE – the landowner – to incur enormous costs over many months to identify and to separate the materials left on-site, to dispose of them properly, and to decontaminate the property. In addition, ARE suffered significant damages because the property was untenantable into 2002, by which point market conditions had changed materially to ARE's detriment.

Respondents Hanna, Nardin, Swindle, and Cox were Intracel's operating management, specifically its chief executive officer, chief operating officer, chief financial officer, and general counsel, while Respondents Lindsay, Dubroff, and Fox were Intracel's directors (collectively "Respondents"). They controlled Intracel's primary funding source, supervised Intracel's activities on a day-to-day or week-to-week basis and were heavily involved in key operating decisions such as those related to Intracel's move-out. Respondents knew that Intracel used chemicals, radiation, and biological materials, and that leaving the Premises entailed moving or disposing of tons of material, much subject to special government regulation. Cox had experience practicing environmental law. Each of the defendants other than Fox had been present at the Premises. Hanna, Nardin, Swindle,

and Cox worked there. Lindsay and Dubroff had visited. These seven were the individuals who decided to leave materials in ARE's buildings.

During the last week of April 2001, Intracel began the process of moving its operation to another location. By April 30, Intracel had vacated the Premises but had failed to remove huge quantities of its materials. Intracel abandoned a variety of materials and equipment on the Premises including, but not limited to, laboratory and scientific equipment, two irradiators,[1] chemicals, biological materials, radioactive materials, papers, and furniture.

ARE called its environmental consultant, Environ Corporation, upon finding the Premises in disarray on April 30, 2001. Environ photographed the condition in which defendants left the Premises. There is no dispute that unlabelled chemicals were left throughout the Premises. There is no dispute that some materials were spilled and left. There is no dispute that radioactivity was found in areas outside the rooms licensed for use of radioactive materials, raising the specter that hazardous materials were located indiscriminately throughout the building. Because ARE did not know the identities of all the

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[1] Irradiators are relatively large pieces of equipment used to give a biological specimen a precisely known dose of radiation. They contain within them radioactive material to provide a source of radiation. Their use is permitted and controlled by government regulation.

materials, and because some were obviously chemically hazardous, biohazardous, and radioactive, the condition of the building posed a risk to ARE's employees, other tenants, any new tenant, and the general public. Neither ARE nor its experts have ever heard of a departing health sciences tenant leaving space in as bad a condition as defendants left the Intracel space.

For months, ARE attempted unsuccessfully to induce Respondents to return to the Premises to remove the abandoned materials from the Premises. By July 2001, ARE determined that it needed to take action both to mitigate its own damages and to minimize the risk to the public health and the environment. ARE could have brought suit against Respondents immediately after they discovered Respondents' violations of RCRA to force Respondents to fund a clean-up of the Premises. *See* 42 U.S.C. § 6972(a)(1)(A) and (B). Given the danger posed by conditions at the premises which would continue to pose a threat to ARE's other tenants and anyone else in the building during the pendency of a lawsuit, ARE opted to clean up the Premises itself, although ARE had no hand in creating the hazardous conditions at the Premises. ARE therefore engaged its own contractor to clean up Respondents' mess. The clean-up took several months and cost more than $500,000. In addition, ARE incurred substantial legal expenses and suffered damages in the form of lost rent during the period of time the Premises was unavailable to be leased. In September 2001, after months of operations in a new

Frederick, Maryland, facility and months after it had abandoned the hazardous wastes, Intracel filed a petition in bankruptcy.

Respondents did not abandon hazardous waste, radioactive materials and other hazardous materials at ARE's property due to a lack of funds. ARE properly pleaded, based upon an investigation into the evidence, that Intracel had plenty of money to pay for the clean-up, but instead used the money to pay for such things as a security deposit and rent for a new location in Frederick, payroll, raises for certain employees, and $600 per month for Hanna's luxury car lease. Intracel continued to receive hundreds of thousands of dollars from Intracel Acquisitions Holding Company ("IAHC"), a corporate entity created to fund Intracel's operations, in the months prior to and after Intracel vacated and abandoned materials at the Premises. David Carlisle, Intracel's former controller, testified that he prepared a chart listing all of the money Intracel received from IAHC through August 2001. Intracel received more than $730,000 from IAHC in the month it vacated the Premises and $1.2 million from IAHC in the five months *after* Intracel vacated. Respondents simply chose not to use the available funds to remove their waste.

C. Procedural Background

In September 2002, ARE brought suit in the Circuit Court for Montgomery County, Maryland, against Respondents, the individuals who oversaw

and directed the abandonment of materials on ARE's property. On July 27, 2004, on a motion to dismiss, the circuit court decided that ARE could not state a claim for negligence, ruling that a tenant owed no duty to its landlord to handle or to discard hazardous wastes, radioactive materials and other hazardous materials safely and in compliance with law. At the same time, the circuit court decided that ARE could not state a claim for punitive damages arising from intentional, unsafe abandonment of hazardous, biohazardous, and radioactive materials. On November 4, 2004, the circuit court granted summary judgment against ARE on the remaining counts of the Second Amended Complaint, holding that abandoning hazardous materials on someone else's property in violation of law did not constitute either a trespass or the tort of waste. On November 5, 2004, ARE appealed. In an unreported decision dated August 24, 2006, the Court of Special Appeals of Maryland reversed the circuit court's decision with respect to trespass, but affirmed the circuit court's dismissal of all other counts, including negligence. (App. 1-44.)

The Court of Special Appeals affirmed the dismissal because it found that Respondents did not violate any statute that was intended to protect against the type of harm ARE suffered at the hands of Respondents. (App. 18.) The Court of Special Appeals reasoned that Respondents owed no common law or regulatory duty to leave waste behind in a safe condition. (App. 17-21.) Additionally, the Court of Special Appeals held that ARE had not properly

pleaded a breach by Respondents of any duty they owed under RCRA or Maryland's parallel regulations to segregate, to package, or to label hazardous wastes, radioactive materials and other hazardous materials correctly because those materials were not offered for transportation; they were abandoned in place. (App. 20.)

By order dated December 6, 2006, the Court of Appeals of Maryland granted Respondents' petition for writ of certiorari to consider whether Respondents' abandonment of hazardous materials on ARE's property constituted trespass. (App. 49-52.) On the same day, the Court of Appeals of Maryland denied ARE's conditional cross-petition to consider whether the Respondents' conduct also constituted negligence. (App. 49-50.) In its opinion dated August 22, 2007, the Court of Appeals ruled that Respondents' conduct could not constitute trespass. The Court of Appeals did not address the merits of the negligence claim because it had denied ARE's conditional cross-petition for certiorari with respect to the negligence count. On September 20, 2007, Petitioner timely filed a motion for reconsideration of the denial of the negligence claim founded on the duties created by RCRA, and that motion was denied by the Court of Appeals of Maryland on September 27, 2007. (App. 53.)

REASONS FOR GRANTING THE PETITION

I. THE MARYLAND COURTS HAVE DECIDED AN IMPORTANT ISSUE OF FEDERAL HAZARDOUS WASTE LAW INCONSISTENTLY WITH THE DECISIONS OF SEVERAL COURTS OF APPEALS

In contrast to the Maryland courts' findings of no duty, at least two courts of appeals have upheld criminal convictions premised upon individuals, including owners of a company, abandoning hazardous materials that became waste, *United States v. Sims Brothers Construction, Inc.*, 277 F.3d 734 (5th Cir. 2001); *United States v. Wagner*, 29 F.3d 264 (7th Cir. 1994); a third has upheld an action by the Environmental Protection Agency ("EPA") concluding that abandoned slag was a solid waste regulated under RCRA, *Owen Electric Steel Co. v. Browner*, 37 F.3d 146 (4th Cir. 1994); and a fourth held that closure of a plant with stored useful solvents constituted "disposal," *Nurad, Inc. v. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992).

In *United States v. Sims Brothers Construction, Inc.*, the Fifth Circuit Court of Appeals affirmed the district court's acceptance of guilty pleas for violations of RCRA for illegal storage of hazardous waste. The defendants had left canisters of methyl bromide in an open area near a work site for three weeks until they were stolen. *Id.* at 738. Eventually someone died from methyl bromide poisoning. The same could have occurred here were it not for ARE's responsible actions. In *Sims Brothers*, the defendants, showing

more responsibility than the Respondents in this case, had, at least, intended to have someone remove the canisters from the site, but the canisters were never removed. Nevertheless, the Court of Appeals for the Fifth Circuit held that there was no other conclusion but that the canisters were abandoned or discarded and were therefore "solid waste" for purposes of RCRA. *Id.* at 742.

Similarly, in *United States v. Wagner*, the Court of Appeals for the Seventh Circuit affirmed convictions for unlawful storage and disposal of hazardous waste in violation of RCRA. Defendants owned a photo-etching business that used ferric chloride in the photo-etching process. The defendants did not have a permit for storage or disposal of hazardous waste. The convictions were based on the defendants' illegal storage of spent ferric chloride in and around the facility, and their subsequent disposal of similar wastes by abandoning the business premises when the owners moved the business operation to Florida. *See U.S. v. Wagner*, No. 92-CR-71, 1992 U.S. Dist. LEXIS 22218, *3 (E.D. Wis. Dec. 16, 1992), *aff'd*, 29 F.3d 264 (7th Cir. 1994).

The Court of Appeals for the Fourth Circuit in *Nurad, Inc. v. Hooper & Sons Co.*, similarly held that abandoning hazardous materials constituted "disposal" for purposes of RCRA. Although this is actually a CERCLA case, the court notes that Congress expressly provided that the term "disposal" under CERCLA "shall have the meaning provided in section 1004" of RCRA (42 U.S.C. 6903(3)). *Nurad*, 966 F.2d

at 845. The court found that defendants disposed of hazardous substances at the site by depositing them in underground storage tanks and abandoning them upon closing the plant. The court reasoned that even if it were to accept the defendants' argument that the storage of useful mineral spirits for active use as a raw material cannot constitute disposal because the spirits were not "waste," the spirits became waste when the company closed down the plant and abandoned the tanks. *Id.* at 847.

Finally, in *Owen Electric Steel Co. v. Browner*, the Court of Appeals for the Fourth Circuit held that EPA did not abuse its discretion in concluding that Owen Electric Steel Company's slag was solid waste within the definition of RCRA. In analyzing case law addressing the meaning of "discarded material," the court noted that "only materials that are 'disposed of' or 'abandoned' become part of the waste disposal problem" with which RCRA is concerned. *Browner*, 37 F.3d at 149. The court held that the EPA was justified in concluding that, because the slag sits untouched for six months before it is sold to other entities, it is "part of the waste disposal problem." *Id.* at 150.

We have been unable to find any court of appeals that has endorsed the remarkable notion that a company that abandons materials that constitute hazardous waste has no duty to label them, to store them properly, and, pursuant to a waste manifest, to arrange for their transportation to a permitted hazardous waste treatment or disposal unit for their proper disposition.

When Respondents abandoned hazardous materials at ARE's property, the materials became "part of the waste disposal problem" with which RCRA is concerned, and that material was "discarded" for purposes of RCRA. The regulations define "discarded material" as any material that is abandoned by being "disposed of," "burned or incinerated" or "accumulated, stored or treated . . . before or in lieu of being abandoned by being disposed of, burned, or incinerated." 40 C.F.R. § 261.2. The material then became "solid waste." *See* 42 U.S.C. § 6903(27). Some of the material was "hazardous waste" for purposes of RCRA. Hazardous waste must be labeled, contained, and properly stored while awaiting transportation to a permitted treatment, storage, or disposal facility.[2] *See* 42 U.S.C. § 6922(a); 40 C.F.R. § 262.34. Maryland has parallel regulations. COMAR § 26.13.03.05. In a nutshell, the federal and state hazardous waste rules (and the other rules cited by Petitioner) do not require hazardous waste pickups every hour or every

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[2] RCRA excludes "[s]ource, special nuclear or by-product material as defined by the Atomic Energy act of 1954" from the definition of solid waste. 40 C.F.R. § 261.4(a)(4). The federal Atomic Energy Act of 1954, 42 U.S.C. §§ 2014-2114, and the regulations promulgated thereunder, however, impose similar, if not more stringent requirements for the storage, transfer and disposal of by-product, source or special nuclear material pursuant to licenses issued by the Nuclear Regulatory Commission ("NRC"). *See* 40 C.F.R. Part 20. In Maryland, by agreement with the NRC, the Maryland Department of the Environment regulates the use and disposal of radioactive materials. *See* COMAR §§ 26.12.26.15.

day. As a generator of hazardous waste under RCRA, Intracel was permitted to store hazardous waste at the Premises for limited periods of time so long as it complied with regulations regarding the proper handling and storage of the waste. Waste cannot be accumulated in a facility in random corners without packaging or labeling precisely to protect against events like the abandonment here. In addition, at the moment Intracel abandoned the premises, the materials were "abandoned" and become hazardous wastes.

The Maryland Court of Special Appeals found that the "[n]one of the COMAR [hazardous waste] regulations cited in ARE's brief here have application because . . . there was no allegation that any of the defendants transported the waste offsite or otherwise disposed of the hazardous materials. Instead, they left it at the leased premises." (App. 20.) In fact, the federal case law makes its clear that leaving the hazardous materials at the leased premises constitutes abandonment which constitutes disposal. Moreover, the regulatory sections cited by ARE do not apply only where hazardous wastes (or other forms of waste) are actually offered for transportation. They apply to all waste accumulated at a facility that is not permitted as a hazardous waste facility. If waste generated by a business – like ARE's tenant's business – is never going to be offered for transportation to a proper disposal facility, that business cannot have it on the property at all without a permit. 40 C.F.R. § 262.34(b); COMAR § 26.13.03.05E(2). The Court of Special Appeals' decision holds the opposite. The Court

of Special Appeals ruled, in effect, that wastes may be held indefinitely without any regulatory obligation to put them in a safe package in a safe place with a label that identifies them and how long they have been stored. (App. 20.) If the regulators happened upon a warehouse full of unlabelled, leaking, unidentified chemicals, they could take no action, under the Court of Special Appeals' reading of the law, because those chemicals had not been offered for transportation.

This ruling conflicts with the rulings of the Courts of Appeals for the Fifth and Seventh Circuits, discussed above, which have upheld criminal convictions for violations of RCRA premised on abandonment of hazardous materials. *Sims Bros. Constr., Inc.*, 277 F.3d at 742; *Wagner*, 29 F.3d at 267. The decisions of the Court of Appeals for the Fourth Circuit, also discussed above, further confirm that abandoning materials is the type of activity that falls within the purview of RCRA. *Browner,* 37 F.3d at 150; *Nurad,* 966 F.2d at 847.

Thus, Intracel had a duty to ARE to comply with the requirements of RCRA and its failure to do so was a breach of that duty. Moreover, it is well-established that corporate officers and directors can be held individually liable if they were personally involved in or directly responsible for corporate acts in violation of RCRA. *See, e.g., United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991) (upholding criminal conviction of civilian employees of Aberdeen Proving Ground for unpermitted storage

of hazardous wastes); *United States v. Union Corp.*, 259 F. Supp. 2d 356, 404 (E.D. Pa. 2003) (holding corporate officers and directors individually liable under § 7003(a) of RCRA because, as corporate officers and directors, they operated the facility); *see also United States v. Ne. Pharm. and Chem. Co., Inc.*, 810 F.2d 726, 746 (8th Cir. 1986) (holding corporate vice president who had authority to control the handling and disposal of hazardous substances liable for violations of CERCLA and RCRA and rejecting defendant's argument that he could not be held individually liable because he acted solely as a corporate officer on behalf of the corporation). It is not necessary to "pierce the corporate veil" in order to impose liability directly on the corporate officers or directors who were in a position to control the proper disposal of hazardous wastes. *See Union Corp.*, 259 F. Supp. 2d at 404. Liability in these cases does not flow from the corporation's obligations. Individuals have a personal duty to conduct their affairs without imposing a risk to public health, safety, or the environment. If those affairs include acting for or controlling a corporation, then the corporation may have duties as well, but the individual duties remain.

Additionally, the Court of Special Appeals improperly relied on *Meghrig* in finding no duty on the part of the Respondents. (App. 18.) In *Meghrig* this Court ruled that RCRA does not create *a federal private cause of action* for past clean-up costs. *Meghrig*, 516 U.S. at 486. *Meghrig*, however, does not address the scope of the *duty* created by RCRA, which

is separate from the type of remedy available under the statute. RCRA may not provide a federal remedy for damages, but that does not change the fact that Respondents had a duty under RCRA to manage and to dispose of their hazardous waste in compliance with RCRA and other parallel laws.

II. THE CURRENT STATE OF THE LAW IN MARYLAND THREATENS ADVERSE CONSEQUENCES AFFECTING PUBLIC HEALTH AND SAFETY

The legal errors of the Maryland courts have significant implications for public policy and public safety. They endorse a cavalier attitude toward the management of dangerous materials, which is in direct contravention to the objectives of RCRA. Congress enacted RCRA in 1976 in response to the hazards posed by improper handling of hazardous wastes. We are all familiar with the damage to health and the environment by notorious disposal sites such as Love Canal or the Valley of the Drums. Congress enacted RCRA to prevent such incidents from recurring. This is reflected in the legislative findings expressed in the statute:

> The Congress finds with respect to the environment and health, that –
>
> . . .

> (2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;
>
> . . .
>
> (5) the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment;
>
> (6) if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming. . . .

42 U.S.C. § 6901(b).

In light of these findings, in *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), the Court of Appeals for the Ninth Circuit noted the following in affirming a defendant's felony conviction for disposal of hazardous waste without a permit where defendant had ordered the burial of paint-filled drums:

> The overriding concern of RCRA is the grave danger to people and the environment from hazardous wastes. Such wastes typically have no value, yet can only be safely disposed of at considerable cost. Millions of tons of hazardous substances are literally dumped on the ground each year; a good deal of these can blind, cripple or kill. RCRA "was enacted to protect the national health and environment" . . . Congress has determined that "hazardous waste presents, in addition to the

> problems associat[ed] with non-hazardous waste, special dangers to health and requires a greater degree of regulation than does non-hazardous solid waste."

Hoflin, 880 F.2d at 1038 (citations omitted). The objectives of RCRA therefore include "assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment" and "requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date." 42 U.S.C. § 6902(a)(4) and (5). This Court should not let stand a holding that hazardous materials may be left in any condition in any location prior to being offered for transportation. That has not been the law since the 1970s. This Court should not let stand a holding that any material may be left behind in any condition with no minimal efforts to protect the next person who enters the room from harm.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted in order that this Court may review the judgment of the Court of Appeals of Maryland and, ultimately, to vacate the judgment below.

Respectfully submitted,

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UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1502

September Term, 2004

ARE ACQUISITIONS, LLC

V.

MICHAEL HANNA, JR., ET AL.

Salmon,
Krauser,
Wenner, William W. (Ret., Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: **August 24, 2006**

This appeal involves a complicated set of underlying facts, many of which were set forth in a forty-two page, second-amended complaint filed by appellant, ARE Acquisitions, LLC ("ARE"). The second-amended complaint was filed in the Circuit Court for Montgomery County, and it names seven individual defendants, all of whom were alleged to be affiliated, in some fashion, with Intracel Corporation ("Intracel"). In addition, ARE named Intracel Acquisition Holding Company, LLC ("IAHC"), and Dublind Partners, Inc. ("Dublind Corp."), as defendants.

The individual defendants and their affiliation with Intracel are: Michael G. Hanna, Jr. (Chief Executive Officer); Peter Nardin (Chief Operating Officer); Jonathan Swindle (Chief Financial Officer); Charles Dubroff (Director); Richard Cox (General Counsel); Charles Lindsay (Director); and David Fox (Director). The second-amended complaint contains six counts, but only three are here of importance, i.e., trespass (Count 1); waste (Count 2); and negligence (Count 3).[1]

Intracel was not named as a defendant. It filed for bankruptcy in September 2001. ARE asserted a $728,752 claim against it in the bankruptcy proceeding.

As to the trespass count, ARE sought summary judgment against all the individual defendants except Cox. That motion was denied. The motions judge also dismissed, without leave to amend, ARE's negligence count and all portions of the complaint requesting punitive damages. Later, the court granted a motion for summary judgment in favor of all defendants as to the trespass and waste counts.

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[1] In its reply brief, ARE contends that it challenges in this appeal the circuit court's grant of summary judgment in favor of the defendant as to the counts of aiding and abetting waste and aiding and abetting trespass. But in its initial brief, ARE did not challenge the grant of summary judgment as to either aiding and abetting waste or aiding and abetting trespass. Thus, those challenges are waived. *Oak Crest Village, Inc. v. Murphy*, 379 Md. 229, 241-42 (2004).

ARE filed this timely appeal in which it claims: (1) the court erred in dismissing the negligence count; (2) the court erred in granting summary judgment in favor of the defendants on the trespass count; (3) the trial court erred in granting summary judgment in favor of the defendants as to the waste count; (4) the court erred in dismissing the portion of the second amended complaint in which ARE attempted to set forth its entitlement to punitive damages; and (5) the court erred in denying ARE's motion for summary judgment as to liability as to all individual defendants except Cox on the trespass count.

I.

A. Dismissal of the Negligence Count

All of the defendants filed motions to dismiss Count 3, the negligence count, for failure to state a cause of action upon which relief could be granted. In considering whether the motions judge erred in granting the dismissal motion, we must assume the truth of all well-pleaded relevant facts as set forth in the second-amended complaint, as well as all inferences that reasonably can be drawn therefrom. *See Alleco v. Weinberg Foundation*, 340 Md. 176, 193 (1995). "On the other hand, any ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the Pleader." *Alleco*, 340 Md. at 193 (quoting *Charrow v. State Farm Mut.*, 306 Md. 754, 768 (1986)).

"[S]o long as the complaint on its face does not 'state a claim upon which relief may be granted, we may affirm the dismissal of the complaint, even on a ground not relied upon by the circuit court." *Lizzi v. WMATA*, 156 Md. App. 1, 7 (2004).

B. Allegations in the Second-Amended Complaint Concerning Defendants' Negligence

ARE is the owner of an office building containing laboratory space located at 1330 Fickard Drive, Rockville, Maryland (hereafter "the property"). When ARE purchased the property in June 1997, Intracel, a biopharmaceutical company that was in the business of developing vaccines and other products for the treatment of various diseases, was a tenant occupying the property. ARE thus inherited Intracel as a tenant.

Intracel's operations involved the use of hazardous material commonly used in the biopharmaceutical industry, including biological agents and radioactive material, as well as various chemicals, such as acids, lacquer thinner, oxygen, argon, cage-washing detergent, and sodium hydroxide. Intracel's operation also involved the use of incinerators, irradiators, syringes, and other scientific equipment.

Intracel experienced financial difficulties in 1998 because it was generating little or no revenue. As a consequence, it needed "regular infusions of capital to meet its expenses."

In March 1999, Intracel's then chief executive officer approached Charles Lindsay (one of the appellees) and attempted to Persuade him to invest money in Intracel. Lindsay and Charles Dubroff (also an appellee) were part owners of another, appellee, Dublind Corp. Prior to March 1999, Dublind Corp. had made investments in Intracel.

The discussions with Lindsay proved fruitful, and in August 1999, Lindsay agreed to have Dublind Corp. transfer money to Intracel in exchange for seventy percent of Intracel's common stock, one hundred percent of Intracel's preferred stock, and a security interest in certain of Intracel's assets. Shortly thereafter, Dublind Corp., Lindsay, and Dubroff formed IAHC "and began advancing money to Intracel through IAHC to fund Intracel's operations." Contemporaneously with this infusion of money, IAHC began to take measures to protect its investment. For instance, IAHC sent Appellee Nardin, an employee of Dublind Corp., to Intracel with the job of protecting IAHC's investment by monitoring Intracel's finances and operations. Thereafter, Nardin reported back to Defendants Lindsay, Dubroff, and other individuals affiliated with Dublind Corp. and IAHC concerning Intracel's operation. From August 1999 onward, Nardin "worked at the premises to limit and closely control Intracel's cash and spending and to protect IAHC's investment in Intracel."

Dublind Corp. and IAHC hired Appellee Swindle in December of 1999 "to consult for Dublind [Corp.] and IAHC regarding Intracel's finances and to protect

the investment in Intracel made by Dublind [Corp.] and IAHC." In March 2000, Dublind Corp. and IAHC arranged "to have Swindle become Intracel's full-time chief financial officer."

At approximately the same time as Swindle became the chief financial officer of Intracel, Appellees Nardin, Dubroff, Lindsay, and Fox became members of Intracel's board of directors, and Nardin became Intracel's chief operating officer. Thereafter, Dublind Corp. and IAHC "became Intracel's primary source of funding for operations" and all the individual defendants, except Cox, "controlled the flow of money into and out of Intracel," as well as the uses of such funds. Financial control was so strict that, by early 2000, Intracel was required to obtain the approval of IAHC and all individual defendants, except for Cox and Fox, "for every payment Intracel made." Whenever Intracel needed to pay money for operating expenses, Intracel's comptroller would submit a written request to Swindle, Intracel's CFO; Swindle would, in turn, consult with Defendants Dubroff, Lindsay, and Nardin, and that foursome "would decide which expenses IAHC would provide Intracel with funds to pay." If a decision was made to pay the expense, Dublind Corp. and/or IAHC "would then wire only enough funds" to Intracel to pay for the specific expenditures which Dublind Corp., "IAHC, Dubroff, Lindsay, Nardin, and swindle approved." Despite this infusion of money, Intracel continued to incur significant expenses, including rent.

In early 2000, Clym Environmental Services, LLC, conducted an environmental audit of the premises Intracel leased from ARE. The audit revealed that "Intracel was not in compliance with numerous environmental health and safety laws and regulations because, *inter alia*, Intracel was storing its hazardous waste onsite for extended periods of time, rather than removing and properly disposing of it as required by law." The audit also revealed that Intracel "had failed to maintain proper records concerning its hazardous activities, failed to conduct adequate employee safety training, and failed to conduct legally mandated surveys of its chemical and radioactive waste." Despite knowing of these safety deficiencies, "[d]efendants failed to provide funding to allow Intracel to adequately correct these conditions."

In September 2000, Intracel fell behind in its rent payments to ARE. By early 2001, Intracel owed ARE approximately $400,000 in back rent.

In January 2001, the defendants caused Intracel to sell one of its divisions for $9 million. After Intracel paid off the division's creditors, Intracel netted approximately $7 million in cash from the sale. But instead of "using a portion of the $7 million [proceeds] to pay Intracel's lease obligations and to correct the illegal and improper management of hazardous waste, biomedical waste and radioactive materials by Intracel," Dublind Corp. and IAHC, along with Appellees Dubroff, Lindsay, Nardin, and Fox "caused all of the $7 million to be transferred to IAHC and/or Dublind [Corp.]." In addition, from the sale of the

division, Dublind Corp. was paid a sales commission "of between $450,000 and $600,000."

Defendants also used $500,000 of the proceeds from the sale of the division "to fund IAHC's purchase of debt from another of Intracel's lenders." This half-million-dollar expenditure "did nothing to benefit Intracel, and only served to increase [d]efendants' potential yield on their investment in Intracel."[2] During some unspecified period, the defendants "continued to operate Intracel despite the fact that it was insolvent," inasmuch as its "liabilities exceeded its assets by a significant margin, and Intracel was unable to meet its obligations as they became due."

On April 4, 2001, "after Intracel was in default on its lease obligations for approximately seven months, and after Intracel breached numerous promises to cure its defaults and to fulfil its obligations under the lease," ARE notified Intracel that the lease was terminated effective April 19, 2001, and that Intracel had to vacate the premises by that date.

After receipt of the April 4, 2001, termination notice, "Defendants [sic] made a payment to ARE, which was only a portion of the rental arrearages."

According to the second-amended complaint, all nine defendants "became upset at ARE over what

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[2] As to several of the individual defendants, there is no indication in the second-amended complaint that they had any investment in Intracel.

they perceived as ARE's unreasonable refusal to accept their proposal to reduce Intracel's monthly rent obligation and/or the amount of space at the [p]roperty that Intracel was leasing." Intracel held a board of directors meeting on April 12, 2001. At the meeting, Defendant Swindle, Intracel's chief financial officer, advised the board members in attendance, which included Appellees Hanna, Dubroff, Lindsay, and Nardin, that Intracel would be evicted from the premises "immediately" unless the rent was paid in full. Despite this immediate eviction threat, the board of directors of Intracel "deliberately decided to take no action so as to keep the $7 million received" in the hands of IAHC and Dublind Corp. and thereby "avoid[ed] paying ARE the rent owed and/or properly removing the hazardous waste material from the premises."

According to the second-amended complaint, at some point in time, which is not specified, Dublind Corp., IAHC, and all of the individual defendants except Cox "had already decided that Intracel would vacate the [p]remises and relocate to a smaller facility without paying ARE any of the money due under the [l]ease, and without paying" for the proper disposal of the hazardous waste being stored on the property.

On the same day as the board of directors meeting (April 12, 2001), Appellee Dubroff met with "certain upper-level employees" of Intracel and told them for the first time that Intracel was going to move out of the premises to a new location. On April 12, 2001,

Intracel began "the huge task of vacating the premises."

Twelve days later, on April 24, 2001, Nicholas Pomotto, Ph.D., Intracel's safety officer, sent Appellees Hanna, Nardin, Swindle, and Cox a memorandum "reminding them of Intracel's obligation under various environmental laws and regulations to properly remove and dispose of all hazardous materials at the premises." Dr. Pomotto sent this memorandum because "[d]efendants ignored his prior oral request" for "resources to properly and legally remove and dispose of Intracel's hazardous materials."

Intracel remained in possession of the premises until April 30, 2001.

The complaint asserts that "in retaliation for ARE's refusal to allow Intracel to remain at the premises on their terms, [d]efendants deliberately elected not to properly and legally contain and safely remove all the hazardous waste and material from the premises," and based on the same motive, "Intracel left the premises in disarray, abandoning large quantities of unwanted hazardous waste and contaminated materials, including but not limited to, biological agents, radioactive material, and dangerous chemicals. . . ." The abandoned materials, in many cases, "were left unlabeled, and/or unidentified," which significantly and quantifiably increased the risk, timing, and expenses of disposal, which ARE later incurred. In addition, at some unspecified time,

hazardous materials were spilled on lab benches and the floor. Moreover, hazardous materials

> were strewn about the premises in a manner which demonstrated that [d]efendants intended in retaliation for ARE's refusal to Intracel to remain at the premises on defendants' terms, and with actual malice and ill will to increase the amount of harm to ARE's property, as well as a risk and expense of cleaning up the material.

In addition, Intracel "left strewn about the premises unwanted and contaminated laboratory materials and equipment, including but not limited to, cabinets, refrigerators, freezers, incubators, syringes, thermometers, carts, shelving, chairs, desks, and office supplies." Included in the contaminated material left behind "were two large irradiators, which were subject to numerous permits and environmental laws." These irradiators had to be later "leak tested and removed from the site by ARE at great expense."

Intracel also left at the premises an incinerator that "contained a large quantity of ash, including some which was only partially incinerated." The incinerator ash had to be analyzed, packaged, and disposed of by ARE. In addition, Intracel, "at the direction of [d]efendants and with retaliatory intent also caused other significant damage to the premises, including intentionally ripping out interior doors and doorframes."

All the individual defendants, except Dubroff, Lindsay, and Fox "were present at the premises in late April 2001, and directed and participated in Intracel's departure from the premises, including the retaliatory abandonment of waste and contaminated material at the premises."

Swindle was in charge of overseeing Intracel's move from the premises, and he "physically participated in removing hazardous materials from refrigerators and abandoning it at the premises." When Intracel left, the premises were in a "state of disarray, disrepair, and full of chemical, biological, and radioactive hazardous waste." This was done intentionally by the defendants "with ill will and actual malice, and in retaliation for ARE's refusal to allow Intracel. to remain at the premises on [d]efendant's terms. . . ."

On the date of Intracel's departure, Defendants Cox and Swindle met with representatives of ARE, as well as a representative from Intracel's environmental consultant. The consultant observed that "Intracel had left 'substantial' amounts of waste, chemicals, trash, and other items strewn about the premises in a way that a 'major effort' would be required to properly clean up the premises." The environmental consultant concluded that an earlier cost estimate for the clean-up "was no longer valid in light of the manner in which [d]efendants had strewn hazardous materials around the premises."

Despite a promise by Intracel to have the environmental consultant perform the clean-up, Intracel

never provided ARE with an adequate plan, nor did Intracel provide the environmental consultant "with adequate funds to perform the clean-up."

On June 15, 2001, Intracel's environmental consultant told Intracel that it "would not do any additional work unless it received payment of $12,440." The defendants refused to authorize money to initiate the plan to cleanup the premises "in retaliation for ARE's refusal to allow Intracel to remain at the premises on [d]efendants' terms." This refusal was made despite the fact that Intracel had received the aforementioned $7 million from the sale of one of its divisions, plus another $1 million for the sale of one its licenses. Instead of paying for clean-up costs, "[d]efendants caused the money received by Intracel to be transferred to and retained by IAHC and/or Dublind [Corp.] for the benefit of IAHC and its owners, including" Dublind Corp., Dubroff, Lindsay, and Fox.

After the eviction, defendants "authorized Intracel to enter into leases for new premises and storage facilities, pay security deposits at [the] new locations, and incur additional expenditures, including hiring movers and storing material at a warehouse." Because "of [d]efendants' conduct," ARE was forced to hire contractors "to perform extensive clean-up over a prolonged period of time" to decontaminate the premises at a cost of in excess of $500,000. Additionally, because of the failure to clean up the property, ARE lost rental income in excess of $1.5 million.

The negligence count also alleged that all defendants except for Swindle and Cox "sold Intracel's most valuable assets and siphoned off the property from Intracel, leaving Intracel unable to meet its obligations under the lease and under applicable law and regulations." Lastly, the second-amended complaint alleges that all the defendants "directed, were aware of, and participated in the intentional and wrongful conduct of Intracel, which resulted in property damage to the premises and a loss of use of the premises."

The second-amended complaint alleged that all the defendants owed duties to ARE that

> includ[ed], but [were] not limited to, duties to comply with all the applicable laws, regulations, rules, and orders of every governmental agency having jurisdiction over the [p]remises, including but not limited to those related to health, safety, and environmental protection and to diligently remove and clean up any waste and material abandoned at the premises.

The "acts and omissions" of the defendants

> constituted violations of numerous environmental statutes and regulations, including but not limited to the Atomic Energy Act, the Resource Conversation and Recovery Act, 42 U.S.C. § 6922 (and related regulations at 40 C.F.R. §§ 262.30 and 262.34) and 42 U.S.C. 6929(d)(1) to 6928(d)(2); Md. Code, Environmental Article, Titles 7 and 8; and Sections

> 26.13.11 and .12 of the Code of Maryland Regulations. These statutes were enacted as safety measures, and were designed to protect a class of persons which included ARE, its employees and other occupants of the Property.

In Paragraph 118 of the second-amended complaint, ARE reiterates, albeit in a slightly different fashion, the following allegation:

> Instead of authorizing the payment of funds to pay Intracel's rent and to clean up the [p]remises and restore it to its proper condition, [d]efendants Dublind, Dubroff, Lindsay, Nardin, Fox and IAHC sent $7 million in cash to Dublind and/or IAHC, thereby leaving Intracel insolvent and devoid of funds to perform its obligations under the [l]ease.

II.

Did the court err in dismissing the negligence count as against all defendants?

For a plaintiff to state a prima facie claim in negligence, he or she must prove the existence of four elements by alleging facts demonstrating: "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury

> proximately resulted from the defendant's breach of the duty."

Patton v. United States Rugby Football, 381 Md. 627, 635-36 (2004) (citations omitted).

All nine defendants contend, *inter alia*, that appellant's negligence counts failed to allege facts showing that any of them breached a duty for which recompense can be obtained under a negligence theory.

ARE counters by asserting: officers and directors of a corporation bear personal responsibilities for torts of the corporation in which they participate or that they bring about (citing *Metromedia Co. v. WCBM Maryland, Inc.*, 327 Md. 514, 520 (1992)); the defendants are all officers and directors of Intracel who participated in or brought about the negligence; therefore, if ARE alleged facts showing that Intracel was negligent, then all nine defendants were negligent.

There are several problems with ARE's analysis. First, three of the nine defendants were neither officers nor directors of Intracel, i.e., IAHC, Dublind Corp., and Cox. Thus, as to those defendants, the analysis is fatally flawed. As to the remaining six defendants, there are additional problems.

Violation of a statute may furnish evidence of negligence, but "only where the person alleging negligence is within the class of persons sought to be protected, *and the harm suffered is of the kind which*

the statute was intended, in general, to protect." See Atlantic Mutual v. Kenney, 323 Md. 116, 124 (1991) (and cases therein cited) (emphasis added). The defendants contend, and we agree, that the statutes relied upon by appellant were not intended to protect against the type of harm appellant experienced.

In its opening brief, appellant claimed that Intracel and the nine defendants had a duty recognized by various laws and regulations to clean up the premises. ARE contends that a cause of action for negligence was stated because the "defendants directed Intracel to leave materials at the Premises and as a result the material was 'discarded' within the meaning of the federal Resource Conservation and Recovery Act ('RCRA'), 42 U.S.C. §§ 6901-99i. And, according to ARE, under the RCRA, the material, when the defendants left it on the Premises, became 'solid waste,'" as defined in section 6903 (27) of the RCRA.

ARE then argues as follows:

> Any person adversely affected has standing to enforce the requirements of RCRA. 42 U.S.C. § 6972. Corporate officers and directors are responsible for RCRA violations of their corporations. *See, e.g., United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991) (upholding criminal conviction of civilian employees of Aberdeen Proving Ground for unpermitted storage of hazardous wastes); *United States v. Conservation Chemical Co.*, 733 F. Supp.

> 1215 (N.D. Inc. 1989) (civil enforcement case); Noel Wise, *Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate officer Doctrine to Federal Civil Enforcement*, 21 STAN. ENVTL. L.J. 283 (2002); *cf. Delaney v. Town of Carmel,* 55 F. Supp. 2d 237 (S.D.N.Y. 1999) (citizen suit against corporate officers of real estate development company fails only because no proof of any more than ownership of real estate).

None of the cases cited by ARE are apposite. RCRA was not designed to protect private entities, like ARE, from economic harm. And what ARE seeks in the subject lawsuit is solely for recompense for economic harm, i.e., its clean-up costs.

The Supreme Court has ruled that RCRA's protection for private citizens by way of section 6972 "was not intended to provide a remedy for past clean-up costs." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 486 (1996). The *Meghrig* Court said, in relevant part:

> That RCRA's citizen suit provision was not intended to provide a remedy for past clean-up costs is further apparent from the harm at which it is directed. Section 6972(a)(1) B) permits a private party to bring suit only upon a showing that the solid, or hazardous waste at issue "may present an imminent and substantial endangerment to health or the environment." The meaning of this timing restriction is plain: An endangerment can only be "imminent" if it "threaten[s]

> to occur immediately," Webster's New International Dictionary of English Language 1245 (2d ed. 1934), and the reference to waste which "may present" imminent harm quite clearly excludes waste that no longer presents such a danger. As the Ninth Circuit itself intimated in *Price v. United States Navy*, 39 F.3d 1011, 1019 (1994), this language "implies that there must be threat which is present *now*, although the impact of the threat may not be felt until later." It follows that § 6972(a) was designed to provide a remedy that ameliorates present or obviates the risk of future "imminent" harms, *not a remedy that compensates for past clean-up efforts.* Cf. § 6902 (b) (national policy behind RCRA is "to minimize the present and future threat to human health and the environment").

516 U.S. 485-86 (emphasis added); *see also Furrer v. Brown*, 62 F.3d 1092, 1097-1101 (8th Cr. 1995) holding that Congress did not intend RCRA to provide private citizens with a monetary award for past clean-up costs); *U.S. v. Domestic Indust., Inc.*, 32 F.Supp.2d 855, 870 (1991) (same).

ARE also argues that Maryland has regulations "paralle[l]" to those set forth in section 6922(a) of the RCRA. The "parallel" regulation cited is Code of Maryland Regulations ("COMAR"), section 26.13.05.05. ARE alleges that "special medical waste" and "regulated radiological hazardous substance" as defined in COMAR must be "specially packaged, labeled, and

handled once discarded." For this last proposition, appellant cites COMAR §§ 26.13.12.05 and 26.15.02.04.

COMAR § 26.13.12.05 is inapplicable because it deals with how hazardous material must be specially packaged, labeled, and handled before "*transporting or offering for transport*" the hazardous material. (Emphasis added.) COMAR § 26.15.02.04 deals with identification, classification, and minimum predisposal requirements for hazardous substances and deals with what must be done before shipping or disposing of the substance. None of the COMAR regulations cited in ARE's brief here have application because, in the second-amended complaint, there was no allegation that any of the defendants transported the waste offsite or otherwise disposed of the hazardous materials. Instead, they left it at the leased premises. In sum, appellant's brief fails to point to any COMAR regulation that was breached when Intracel abandoned the property.

ARE also now asserts that the landlord, and by extension all nine defendants, owed a common law duty to it to avoid damage to the leased property. But in the second amended complaint, ARE alleged that the duties, which the defendants owed to it, were the duties

> to comply with all the applicable laws, regulations, rules, and orders of every governmental agency having jurisdiction over the [leased] premises including but not limited to those relating to health, safety, and

> environmental protection, and [imposing the requirement] to diligently remove and clean up any waste and material abandoned at the [leased] Premises.

Thus, although the second amended complaint was ARE's third try at stating a cause of action for negligence, it failed to allege any common law duty that was negligently breached by the defendants.

In large measure, appellant appears to be attempting to assert that the defendants "negligently" breached the lease contract. Such an assertion is insufficient to state a cause of action for negligence. *See Heckrotte v. Riddle*, 224 Md. 591, 595 (1961) (Maryland does not recognize a cause of action for negligent breach of contract unless the plaintiff can show a duty or obligation imposed by law independent of that arising out of contract). More importantly, in its opposition to the motion to dismiss the negligence count, ARE never contended before the motions court that any of the defendants breached a common law duty owed to it. Its sole contention was that the tenant breached a duty imposed by RCRA and/or other governmental statutes or regulations dealing with the handling of hazardous materials. Therefore, appellant's present contention that the defendants were liable under Count 3 due to a breach of a common law duty is not preserved for appellate review. *See* Md. Rule 8-131(a) (except for jurisdictional issues, an appellate court ordinarily will not review on appeal any issue that was neither raised nor decided below).

The motions judge did not err, or abuse his discretion, by dismissing Count III.

III.

Did the trial court err in granting summary judgment in favor of all defendants as to the trespass count?

When the motions judge granted summary judgment in favor of all defendants as to the counts alleging trespass, he did so for "the reasons advanced by [the defendants] in their global motion for summary judgment" set forth at "Docket Entry [No.] 294," including defendants' memoranda in support of that global motion.

Maryland appellate courts, as a general rule, will sustain the granting of a motion for summary judgment only on the grounds upon which the motions judge relied in granting the motion. *Eid v. Duke*, 373 Md. 2, 10 (2003) (citing *Lovelace v. Anderson*, 366 Md. 690, 695 (2001) (quoting *PaineWebber v. East*, 363 Md. 408, 422 (2001))). There is an exception to this general rule, viz., "if the alternative ground is one upon which the circuit court would have had no discretion to deny summary judgment, summary judgment may be granted for a reason not relied on by the trial court." *Vogel v. Touhey*, 151 Md. App. 682, 706 (2003) (citing *Ragin v. Hayden Co.*, 133 Md. App. 116, 134 (2000)). In the subject case, neither party argues that the exception to the general rule is applicable. In fact neither party even mentions the

exception. Accordingly, we shall focus, exclusively, on the grounds relied upon by defendants in their global motion for summary judgment in discussing the trespass and waste counts.

In their motions for summary judgment, the defendants pointed out that a part of ARE's trespass action concerned Intracel's activities on the property between April 18 and April 30, 2001. According to movants, the District Court for Montgomery County ruled that Intracel had a right to remain on the premises and ARE had no right to throw them out during the twelve-day period between April 18 through April 30. The circuit court agreed with this contention, and in this appeal, ARE does not argue that the court erred in granting summary judgment as to that relatively small part of its trespass claim.

The second part of the defendants' global motion for summary judgment, and the only part briefed in this Court by the parties, concerned the defendants' contention that, even if the defendants committed trespass by leaving behind hazardous waste and other materials after they vacated the premises, abandonment of property in this fashion "does not constitute a trespass under Maryland law."

According to movants, the dispositive issue (as to the trespass count) was addressed "squarely" in *Rosenblatt v. Exxon Co.*, 335 Md. 58, 78 (1994). *Rosenblatt* involved land owned by Earl Wagner, which had been leased by Wagner to Exxon from 1951 through 1985. 335 Md. at 63. During that period,

Exxon subleased the property to various operators of gasoline stations. *Id.* In 1986, after Exxon's lease expired, Rosenblatt leased from Wagner the same property that previously had been leased to Exxon. It was thereafter discovered by Rosenblatt that there was extensive petroleum contamination of the soil and ground water on the leased property. *Id.* at 64.

Rosenblatt sued Exxon for damages and included in his complaint a count alleging trespass. *Id.* As to the trespass count, Exxon contended that the tort of trespass

> is concerned only with the rights and obligations of occupiers of adjoining land. For a continuing trespass to occur, it alleged that "there must be an original tortious placing of something on the land of another." *Id.* at 68. The circuit court granted summary judgment in favor of Exxon as to the trespass count and all others.

Id. at 65.

The Court of Appeals said in *Rosenblatt*:

> When a defendant interferes with a plaintiff's interest in the exclusive possession of the land by entering or causing something to enter the land, a trespass occurs. *See Rockland, Inc. v. H. J. Williams,* 242 Md. 375, 385 . . . (1966).
>
> We have recognized that a trespass occurs when there is interference in the exclusive Possession of the land of another, *see*

Rockland, supra, but we have never recognized a trespass where the thing which intrudes actually entered the land during the "trespasser's" possession and the plaintiff took possession of the land subsequent to the "intrusion."

Rosenblatt relies upon § 161 of the Restatement (Second) of Torts (1975) to support his position that Exxon committed a trespass when it allegedly caused the property to be contaminated during its occupancy and the contamination continued into Rosenblatt's occupancy of the land. Section 161 provides that: "A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there."

Section 161 does not support Rosenblatt's position. It explicitly provides that a trespass involves the *tortious placing* of something on the land and implicitly provides that the affected land is the land *of another. Section 158 [of the Restatement (Second) of Torts] further supports this interpretation. It states that "one is subject to liability to another for trespass . . . if he intentionally enters land in the possession of the other, or causes a thing or a third person to do so, or remains on the land, or fails to remove from the land a thing which he is under a duty to remove."* (emphasis added). Exxon did not cause the contamination to occur during Rosenblatt's occupancy; the introduction of the contamination could only have

> occurred prior to its relinquishing possession of the land. Additionally, Exxon owed Rosenblatt no duty to remove the contamination.
>
> Rosenblatt cites no authority, nor do we find any, to support the position he asserts. At least two courts have explicitly rejected similar claims, *see Wilson Auto Enterprises v. Mobil Oil Corp.*, 778 F.Supp. 101 (D.R.I. 1991) (company's release of oil on own land could not constitute trespass upon subsequent occupier); *Wellesley Hills, supra,* 747 F. Supp. at 99 (same), and we think that theirs, is the better interpretation. We conclude, therefore, that the trial court did not err in granting Exxon's motion for summary judgment.

Id. at 78-79 (emphasis added).

Admittedly, as the appellees stress, the words "we have never recognized a trespass where the thing which intrudes actually entered the land during the trespasser's possession and the plaintiff took possession of the land subsequent to the intrusion," when read in isolation, would support the grant of summary judgment in favor of all defendants as to the trespass count. But the language must be read in context. The *Rosenblatt* Court used the language just quoted when explaining why Section 161 of the Restatement (Second) of Torts was inapplicable. But it is important to note that in the course of that discussion, the *Rosenblatt* Court quoted portions of Section 158 of the Restatement (Second) of Torts. Section 158 reads:

§ 158. Liability for Intentional Intrusions on Land

> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
>
> (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
>
> (b) remains on the land, or
>
> (c) *fails to remove from the land a thing which he is under a duty to remove.*

(Emphasis added.)

We read the *Rosenblatt* Court's decision as having said, in effect, that Section 158(a) of Restatement (Second) of Torts was inapplicable because, *inter alia,* Exxon did not "enter land in the possession of the other or cause a thing or a third person to do so." And the *Rosenblatt* Court also rejected the applicability of Section 158(c) because no duty was owed by a former tenant to a successor lessee to remove anything. *Id.* at 79. But in the case at hand, no "successor lessee" is involved.

In the subject case, we can see no reason why Section 158(c) would not be applicable to Intracel. In their global motion appellees asked for summary judgment as to the trespass count because Intracel

could not be sued in trespass for failure to remove material from the formerly leased premise. Appellees did not contend that no duty was owed *by them* to ARE. Thus, we cannot affirm on the latter ground.

ARE contended below and contends in this appeal that the *Metromedia* case is apposite and demonstrates that the defendants may be held liable under the trespass count. We agree. Metromedia Company was the sublessee of approximately forty acres of improved real estate located in Owings Mills, Maryland. 327 Md. at 515. In February 1987, Metromedia entered into an agreement for the subleasing of the premises to Magic 680, Inc. (hereinafter "Magic 680"). Magic 680 defaulted on its obligation to Metromedia, and the receiver of Magic 680 executed an agreement with WCBM to allow the latter to occupy the premises until February 28, 1989. *Id.* at 516.

WCBM refused to move from the premises after. February 28, 1989, and Metromedia filed an action in ejectment against WCBM and its chief executive officer, Nicholas Mangione. *Id.* at 517. Prior to trial, Mangione moved for, and was granted, summary judgment in his favor based on the court's finding that "the plaintiff cannot claim that Mr. Mangione's wearing one hat when he's dealing with them and then wearing another at a later time, and there's been no showing that he was dealing with Metromedia as an individual at any time." *Id.*

The central issue presented in the *Metromedia* appeal was whether WCBM's chief executive officer could be successfully sued in tort for trespass based upon the fact that he, as the chief executive officer of WCBM, had participated in the decision to unlawfully have WCBM remain on the premises after its right to do so had expired. *Id.* at 518. In ruling that summary judgment should not have been granted in favor of Mr. Mangione, the Court said that Metromedia had alleged facts sufficient to establish that WCBM occupied the premises until February 28, 1989, by virtue of an agreement with the receiver of Magic 680. Magic 680, in turn, occupied the premises under a sub-sublease from Metromedia; the term of that sub-sublease expired on February 28, 1989; and consequently, WCBM's rights to occupy the premises also expired on February 28, 1989. According to the *Metromedia* Court, the failure of WCBM to vacate the premises in response to Metromedia's demand caused WCBM to be a trespasser on the property of Metromedia. The Court explained:

> *Fett v. Sligo Hills,* 226 Md. 190 . . . (1961), is apposite. In that case, the evidence showed that Herbert Fett was an accountant employed in New York by Sligo Hills Development Corp., that he moved to Washington, D.C., to work full time for the corporation, that Sligo built a house so that Fett and his family would have a place to live, and that the family moved into the premises with Sligo's permission. There was further proof that Sligo orally agreed to sell Fett the house

for its cost, approximately $40,000, and that, when he sold his house in New York, he was to pay $25,000 in cash and give a deferred purchase money mortgage for the balance of the purchase price. Fett died several months after moving into the house. His widow, without honoring her husband's promise to buy the house, continued to live in the house rent-free with her children and refused to vacate the premises upon Sligo's demand.

Sligo brought suit in ejectment and obtained a judgment for immediate possession of the house and damages against the widow and her children. We affirmed that judgment with a modification of the amount awarded as damages. Judge Hammond, later Chief Judge of this Court, wrote that "ejectment is an appropriate remedy under the circumstances of the case before us." *Id.* at 196. . . . Explaining the appropriate measure of damages, the Court stated:

> "On the question of damages as apart from the right to possession, we think a different test should be applied in this case. Sligo put the Fetts in possession without demanding or expecting compensation in return and left them there on that basis for an extended period. It should not be entitled to damages *until their occupation became tortious, which we think was when the first unequivocal demand to all the Fetts, both adult and infants, to vacate the premises*

> *was made by the filing of the ejectment suit in May, 1958. An occupancy rightful because permissive becomes tortious when a proper demand to vacate is ignored and it is then the occupants become trespassers and damages for their wrongful occupancy begin to accrue. 1 Restatement, Torts, Sec. 158(b), and comment k thereof; Sec. 171, and comment d thereof."*

Id. at 197. . . . (emphasis added).

Id. at 518-19 (some emphasis added).

As can be seen, the *Fett* Court relied on 1 Restatement, Torts, Section 158(b), comment k to Section 158(b), Section 171 of 1 Restatement, Torts, and comment d to Section 171. 1 Restatement Torts, Section 158(b), is substantively the same as Section 158(b), Restatement (Second) of Torts, which we have quoted *supra*. Comment k to Section 158(b) in 1 Restatement of Torts is now comment 1 to Section 158(b), Restatement (Second) of Torts.[3] Section 171 of

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[3] Comment 1 to Section 158, Restatement (Second) of Torts, reads:

> Liability for Intentional Intrusions on Land
>
> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
>
> (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
>
> (b) remains on the land, or

(Continued on following page)

the Restatement (Second) of Torts is the same as 1 Restatement of Torts, Section 171.[4]

The Court held that, if Metromedia's version of events were believed, WCBM became "a trespasser on" the Premises when it refused Metromedia's demand to leave" and that the "trespass constituted tortious conduct on the part of WCBM." *Metromedia*, 327 Md. at 518. The Court went on to hold that Mr. Mangione, as the chief executive officer of WCBM, would also be liable if plaintiffs could prove that Mangione "participated in what is alleged to be an unlawful detention of Metromedia's property by WCBM." *Id.* at 519 (citing, *inter alia, Tedrow v. Deskin*, 265 Md. 546, 550-51 (1972)). "The general rule is that corporate officers or agents are personally liable for those torts which they personally commit, or

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(c) fails to remove from the land a thing which he is under a duty to remove.

[4] Section 171 of the Restatement (Second) of Torts reads:

Termination of Consent

Subject to the privileges of reasonable egress and removal of things, the actor's privilege to enter land created by consent of the possessor is terminated by

(a) the doing of any act, or the happening of any event, or the lapse of any specified period of time by which the consent is restricted, or

(b) a revocation of the possessor's consent, of which the actor knows or has reason to know, or

(c) a transfer or other termination of the possessor's possessory interest in the land.

which they inspire or participate in, even though performed in the name of" the corporation. *Id.* at 520.

In their brief, the appellees' only comment in regard to the *Metromedia* decision is contained in a footnote in their brief that reads:

> Thus a compelling distinction between this case and *Metromedia* . . . is that in *Metromedia,* the defendant continued operations at the leased premises after the expiration of the lease. It was an ejectment action, similar to what ARE filed against Intracel Corporation in District Court. "Abandonment" of the premises was not an issue in *Metromedia.*

Although the precise claim in *Metromedia* was for ejectment, that fact does not detract from the viability of the statement in *Metromedia* that refusal to vacate premises after the term of the sub-sublease expired resulted in the sub-sublessees having committed the tort of trespass. That holding was in complete accord with the provision set forth in Restatement (Second) of Torts, Section 158(b)(2).

It is true, as appellees point out, that Metromedia involved a tenant failing to leave after the term of the lease expired, whereas the case at hand is one where the tenant left but in doing so abandoned property on the formerly leased premises. The Restatement (Second) of Torts, Sections 158(b) and (c) provide that a tenant is liable in tort if, after the term of the lease expires, the tenant either refuses to leave

or abandons property that the tenant had a duty to remove. Appellees suggest no reason why Section 158(c) would not be here applicable, and we think it is applicable in light of the fact that the Court of Appeals gave its implied imprimatur (in the *Metromedia* case) to the legal principles set forth in that section of the Restatement (Second) of Torts.

We can find no meaningful distinction between the *Metromedia* case and the one *sub judice*. We therefore hold that the motions judge erred in granting summary judgment in favor of the defendants on the ground stated, i.e., that no cause of action for trespass could succeed against the landlord and therefore none of the defendants could be liable for trespass. Nothing in the opinion should be read to prevent the defendants, in the future, from moving for summary judgment on the trespass count for any other reason not mentioned in the global motion for summary judgment.

IV.

Did the trial court err in granting summary judgment in favor of appellant on the count alleging waste?

In the global motion for summary judgment, the appellees made the following argument, among others, as to why all defendants were entitled to summary judgment on the waste count: in Maryland damages in an action for waste are controlled by statute; the statute in question is section 14-102 of

the Maryland Real Property Article of the Maryland Code (2003 Repl. Vol.) and imposes liability for waste only upon persons who are (or were) in lawful possession of the premises or who hold (or held) any possessory interest in the nature of a tenancy; ARE had "no evidence to suggest that any of the [d]efendants were in 'lawful possession' of its leased premises, or had any possessory interest in the nature of a tenancy" in those leased premises. The foregoing argument is based on the language of section 14-102, viz.:

> Any mortgagor, including grantor under a deed of trust given as security for payment of a debt or the performance of an obligation, any other person in possession of land, any life tenant, tenant for years, tenant at will, periodic tenant, tenant in common or joint tenant, who, without express or implied authorization, commits or permits waste, is liable for the actual damages suffered by the property.

The just-quoted argument was one of those relied upon by the trial judge when he granted summary judgment in favor of all the defendants as to the count alleging waste.

While ARE acknowledges in its brief that one of the grounds argued by defendants below was that "only the leaseholder, Intracel could be responsible for waste," ARE made no effort whatsoever in its opening brief to show, or even attempt to show, that the statutory cause of action for waste was applicable to

anyone not alleged to be a possessor of real property or who had a possessory interest in the property.

In their brief, the appellees asserted:

> Appellant has never cited any case for the proposition that there may be personal liability for waste, in tort, on the part of someone who did not have a direct possessory interest in the property. Nothing in the statute suggests that the action may be expanded to include such individuals.

ARE, in its reply brief, again made no effort, whatsoever, to rebut the argument that, in order to prove waste, the plaintiff must show that it has facts that demonstrate that the defendant(s) accused of waste was (or were), at some time a "possessor" of the property.

It is a fundamental principle of appellate litigation that if an appellant contends that the circuit court committed error in granting summary judgment, the appellant must present some argument to prove that the motions judge was in fact wrong. Absent such an argument, an appeal cannot succeed. This basic appellate principle forms the basis for Maryland Rule 8-504(a)(5) that requires that an appellant's brief contain "[a]rgument in support of the party's position." *See also Beck v. Mangels*, 100 Md. App. 144, 148 (1994) (failure to make an argument in support of position, waives argument on appeal); *see also Harmon v. State Rds. Comm'n,* 242 Md. 24, 30-31 (1966) (where appellant's brief makes no reference to

one of the issues raised in the trial court, the issue was abandoned and therefore was not properly before this Court).

For the foregoing reason we affirm the grant of summary judgment as to the waste count.

V. DISMISSAL OF THE CLAIM FOR PUNITIVE DAMAGES

As mentioned earlier, the motions judge dismissed ARE's claim for punitive damages.

In *Scott v. Jenkins,* 345 Md. 21 (1997), the Court said:

> We have lately, and at great length, discussed the necessary prerequisites, to a punitive damages award. Lest there be any remaining doubt, in order to recover punitive damages in *any* tort action in the State of Maryland, facts sufficient to show *actual malice* must be pleaded and proven by clear and convincing evidence, and a specific demand for the recovery of punitive damages must be made before an award of such damages may be had.

Id. at 29.

Later in *Scott,* the Court of Appeals makes it clear what must be plead in any tort action where punitive damages are sought:

> Since [*Owens-Illinois* v.] Zenobia, [325 Md. 420 (1992)], we have made it abundantly

clear that "with respect to both intentional and non-intentional torts, . . . an award of punitive damages must be based upon actual malice, in the sense of conscious and deliberate wrongdoing, evil or wrongful motive, intent to injure, ill will, or fraud." *Montgomery Ward v. Wilson,* 339 Md. 701, 733 . . . (1995) (citing *Ellerin v. Fairfax Savings,* 337 Md. 216 (1995); *Alexander & Alexander Inc. v. B. Dixon Evander & Assocs.,* 336 Md. 635, 652 . . . (1994); *Komornik v. Sparks,* 331 Md. 720, 725 . . . (1993); *Adams v. Coates,* 331 Md. 1, 13 . . . (1993)).

V.

As we indicated earlier, the present controversy is prompted by what Scott perceives to be Jenkins' failure to plead adequately his claim for punitive damages, thereby depriving Scott of fair opportunity to respond to the claim. Although the precise issue now raised has never been addressed by this Court, we have offered ample guidance in the past.

a.

Amicus for Petitioner Scott points out that in *Smith v. Gray Concrete and Pipe Co.,* [267 Md. 149 (1972)], we imposed a strict pleading requirement in punitive or exemplary damages cases. We there said that

> "No bald on conclusory allegations of 'wanton or reckless disregard for

> human life' or language of similar import, shall withstand attack on grounds of insufficiency. It follows from what we have said that far greater specificity will be required [when pleading punitive damages] than that reflected by the 'Appendix of Forms' accompanying the Maryland Rules."

Smith, 267 Md. at 168 . . . ; *see also Nast v. Lockett*, 312 Md. 343, 370 . . . (1988), *overruled on other grounds by Owens-Illinois Zenobia*, 325 Md. 420, 460 . . . (1992). Professors Lynch and Bourne of the University of Baltimore have echoed this sentiment, stating that "[a] plaintiff seeking to recover punitive damages must allege *in detail* in his complaint the facts that indicate the entertainment by the defendant of [an evil motive or intent]." MODERN MARYLAND CIVIL PROCEDURE, *supra* § 6.5(b)(2) (emphasis added). *Cf. Summit Loans, Inc. v. Pecola*, 265 Md. 43 . . . (1972) (systematic threatening and vile telephone calls to a debtor sufficient to support a punitive damages award). Our decisions subsequent to *Smith* and *Nast* in no way suggest a departure from that strict pleading requirement.

Id. at 33-35.

ARE argues:

> The facts alleged in the Second Amended Complaint would readily allow a fact finder to infer the defendants' malicious state of

> mind. Defendants did not merely leave the Premises in an untidy condition. Rather, as ARE has alleged, certain [d]efendants left extremely hazardous, chemical, biological, and radiological materials strewn abut the Premises, and diverted the funds necessary to remove those materials to themselves.
>
> ARE alleged that prior to Intracel's receipt of the termination notice from ARE, defendants had made a payment towards the rental arrearage. Although this payment did not cover the entire arrearage, defendants became angry at ARE when ARE terminated Intracel's Lease. Defendants were also upset at ARE for what they perceived to be ARE's unreasonable refusal to accept Intracel's request to pay reduced rent or to give back a portion of the Premises.

ARE further alleged in the Second Amended Complaint that:

> 58. Despite their obligations under environmental laws, and in retaliation for ARE's refusal to allow Intracel to remain at the Premises on their terms, Defendants deliberately elected not to properly and legally contain and safely remove all of the hazardous waste and materials from the Premises by April 30, 2001.
>
> 59. At the direction of Defendants and in retaliation for ARE's refusal to allow Intracel to remain at the Premises on their terms, Intracel left the Premises in disarray, abandoning large quantities of unwanted hazardous

> waste and contaminated materials, including but not limited to biological agents, radioactive materials and dangerous chemicals at the Premises. . . .
>
> 62. Some hazardous materials were strewn about the Premises in a manner which demonstrated that Defendants intended, in retaliation for ARE's refusal to allow Intracel to remain at the Premises on Defendants' terms, and with actual malice and ill will, to increase the amount of harm [to] ARE's property, as well as the risk and expense of cleaning up the materials. . . .
>
> 70. Defendants intentionally, and with ill will and actual malice, and in retaliation for ARE's refusal to allow Intracel to remain at the Premises on Defendants' terms, left the Premises in a state of disarray, disrepair and full of chemical, biological and radioactive hazards. Photographs accurately depicting the condition of the Premises upon Intracel's departure are attached to this Second Amended Complaint as *Exhibit A*.
>
> The foregoing allegations satisfy the pleading requirements for actual malice. . . .

(References to record extract omitted.)

The amended complaint looks in two directions simultaneously as to why the defendants abandoned materials on the leased premises and thereby committed a trespass, which is the only count with continued viability. A large part of the second amended

complaint alleges what can be characterized as "financial-control misdeeds" actions that came about because the defendants failed to provide funding to Intracel. In that regard, IAHC and Dublind Corp. and their agents took various steps to protect their investment by keeping a tight rein on what monies Intracel spent. For instance, according to the second-amended complaint, the Board of Directors on April 12, 2001, deliberately took no action to "properly remove . . . hazardous waste" in order to keep the "$7 million received." These "financial-control misdeeds" were alleged to have taken place because Intracel was insolvent, and IAHC and Dublind Corp. were Intracel's "primary source of funding for operations" and did not want to spend money to fund Intracel's contractual obligation to clean up the premises. Financial motives of this sort for not spending money to clean up the leased premises plainly do not show "actual malice" and thus do not support an award of punitive actions. Other portions of the second-amended complaint allege that property was abandoned by "[d]efendants" not because the defendants simply did not want to spend money but (purportedly) in retaliation "for ARE's refusal to allow Intracel to remain at the premises." As mentioned earlier, when considering a motion to dismiss for failure to state a cause of action, ambiguities or uncertainties must be construed against the pleader. *Alleco, supra,* 340 Md. at 193. This rule is applicable here given the very strict requirements Maryland imposes when a plaintiff attempts to plead the right to punitive damages. Due to its internal inconsistency as to motive, appellant's

second-amended complaint is too ambiguous to meet those strict specificity requirements.

Additionally, in regard to the punitive damage claim, the complaint is ambiguous as to which defendant or defendants did what and for what motive. For example, appellant says in its complaint that Intracel "at the direction of [d]efendants and with retaliatory intent also caused other significant damage to the premises, including intentionally ripping out interior doors and doorframes." Does this mean that Intracel's general counsel, Cox, ripped out interior doors? Does it meant that Dublind Corp., by its agents, ripped out doors? It is impossible to tell. The complaint in this regard is so all-encompassing as to be meaningless.

The motions judge did not err, after giving ARE three tries, in dismissing ARE's claim for punitive damages.

VI. FAILURE OF MOTIONS JUDGE TO GRANT PARTIAL SUMMARY JUDGMENT ON THE TRESPASS COUNT AS AGAINST CERTAIN DEFENDANTS

Appellant claims that the motions judge erred in failing to grant partial summary judgment as to liability for trespass against Defendants Hanna, Swindle, Nardin, Lindsay, and Dubroff. This contention will not detain us long. As pointed out recently by this Court in *Mathis v. Hargrove*, 166 Md. App. 286, 304-05 (2005), with an exception not here applicable, "no party is entitled to summary judgment as a

matter of law," even if the motions judge finds no uncontradicted material facts. Therefore, the motions judge did not err when he denied ARE's motion.

VII.

Appellees filed a motion to dismiss this appeal due to ARE's failure to supply certain required material in an appendix to its brief. We shall deny the motion because the deficiency has now been remedied and appellees have demonstrated no prejudice. *See Burdette v. LaScola,* 40 Md. App. 720, 736 (1978).

JUDGMENT IN FAVOR OF APPELLEES AS TO THE TRESPASS COUNT REVERSED; ALL OTHER JUDGMENTS AFFIRMED; COSTS TO BE PAID SEVENTY-FIVE PERCENT BY APPELLANT AND TWENTY-FIVE PERCENT BY APPELLEES.

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY

ARE Acquisitions, LLC	*	
Plaintiff	*	
v.	*	No. 236630
Michael J. Hanna, *et al.*	*	(Entered Jul. 27, 2004)
Defendants	*	

* * * * * * * * * * * * * * * * * *

ORDER GRANTING IN PART AND DENYING IN PART THE MOTIONS OF DEFENDANTS MICHAEL HANNA, JR., PETER NARDIN, RICHARD COX, JONATHAN SWINDLE, CHARLES DUBROFF, CHARLES LINDSAY, DAVID FOX, INTRACEL ACQUISITION HOLDING CO., LLC, AND DUBLIND PARTNERS, INC. TO DISMISS AND/OR STRIKE THE PLAINTIFF'S SECOND AMENDED COMPLAINT

Upon consideration of the Motions of Defendants Michael Hanna, Jr., Peter Nardin, Richard Cox, Jonathan Swindle, Charles Dubroff, Charles Lindsay, David Fox, and Intracel Acquisition Holding Co., LLC ("IAHC") (Docket number 235) and of Dublind Partners, Inc. ("Dublind") (Docket number 249) To Dismiss and/or Strike the Second Amended Complaint, and upon consideration of Plaintiff's responses and oppositions thereto, and for the reasons given by the Court at the hearing on July 19, 2004, it is this 22 day of July, 2004 ORDERED, ADJUDGED AND DECREED THAT:

The said MOTIONS are hereby GRANTED IN PART AND DENIED IN PART as follows:

1. The Motions to Dismiss Count I of the Second Amended Complaint (Trespass – All Defendants) are DENIED;

2. The Motions to Dismiss Count II of the Second Amended Complaint (Waste – All Defendants) are DENIED;

3. The Motions to Dismiss Count III of the Second Amended Complaint (Negligence – All Defendants) are GRANTED, WITHOUT LEAVE TO AMEND;

4. The Motions to Dismiss Count IV of the Second Amended Complaint (Tortious Interference with Contract – Defendants IAHC and Dublind) are GRANTED, WITHOUT LEAVE TO AMEND;

5. The Motions to Dismiss Count VI of the Second Amended Complaint[1] (Tortious Interference with Prospective Economic Relations – Defendants Dublind, IAHC, Hanna, Dubroff, Lindsay, Nardin and Fox) are GRANTED, WITHOUT LEAVE TO AMEND;

6. The Motions to Dismiss Count VII of the Second Amended Complaint (Alter Ego Liability – Defendant IAHC) are GRANTED, WITHOUT LEAVE TO AMEND;

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[1] The Second Amended Complaint does not contain a Count V.

7. The Motions to Dismiss Count VIII of the Second Amended Complaint (Aiding and Abetting Trespass – All Defendants) are DENIED;

8 The Motions to Dismiss Count IX of the Second Amended Complaint (Aiding and Abetting Waste – All Defendants) are DENIED;

9. The Motions to Dismiss Count X of the Second Amended Complaint (Aiding and Abetting Negligence – All Defendants) are GRANTED, WITHOUT LEAVE TO AMEND;

10. The Motions to Dismiss Count XI of the Second Amended Complaint (Respondeat Superior Liability – Defendant Dublind) are GRANTED, WITHOUT LEAVE TO AMEND;

11. The Motions to Dismiss Count XII of the Second Amended Complaint (Agency Liability – Defendant Dublind) are GRANTED, WITHOUT LEAVE TO AMEND;

12. The Motions to Dismiss Count XIII of the Second Amended Complaint (Fraud – Defendants Hanna, Swindle, Nardin, Lindsay, Dubroff, IAHC and Dublind) are GRANTED, WITHOUT LEAVE TO AMEND;

13. The Motions to Dismiss all of Plaintiff's claims for Punitive Damages are GRANTED, WITHOUT LEAVE TO AMEND.

SO ORDERED:

/s/ Joseph A. Dugan, Jr.
Judge, Circuit Court for
Montgomery County

cc: Thomas J. Minton, Esq.
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MICHAEL HANNA, JR., et al.	:	**IN THE COURT OF APPEALS OF MARYLAND**
v.	:	**Petition Docket No. 400 September Term, 2006**
ARE ACQUISITIONS, LLC	:	**(No. 1502, Sept. Term, 2004, Court of Special Appeals)**

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, the conditional cross petition and the answer filed thereto, in the above entitled case, it is this 6th day of December, 2006

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, granted, and a writ of certiorari to the Court of Special Appeals shall issue; and it is further

ORDERED, that the conditional cross-petition be, and it is hereby denied; and it is further

ORDERED, that said case shall be transferred to the regular docket as No. 87, September Term, 2006; and it is further

ORDERED, that counsel shall file briefs and printed record extract in accordance with Md. Rules 8-501 and 8-502, petitioner's brief and record extract to be filed on or before January 5, 2007; respondent's

brief to be filed on or before February 5, 2007; and it is further

ORDERED, that this case shall be set for argument during the March session of Court.

/s/ Robert M. Bell
Chief Judge

MICHAEL HANNA, JR., et al.	:	**IN THE**
	:	**COURT OF APPEALS**
	:	**OF MARYLAND**
v.	:	**Petition Docket No. 400 September Term, 2006**
	:	**(No. 1502, Sept. Term,**
ARE ACQUISITIONS, LLC	:	**2004, Court of Special Appeals)**

WRIT OF CERTIORARI

STATE OF MARYLAND, to wit:

TO THE HONORABLE THE JUDGES OF THE COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS, *ARE ACQUISITIONS, LLC. v. MICHAEL HANNA, JR., et al.*, No. 1502, September Term, 2004 was pending before your Court and the Court of Appeals is willing that the record and proceedings therein be certified to it.

YOU ARE HEREBY COMMANDED TO HAVE THE RECORD TRANSMITTED TO THE COURT OF APPEALS OF MARYLAND ON OR BEFORE *December 19, 2006*, together with this writ, for the said Court to proceed thereon as justice may require.

WITNESS the Chief Judge of the Court of Appeals of Maryland this 6th day of December, 2006.

/s/ Alexander L. Cummings
Clerk
Court of Appeals of Maryland

MICHAEL HANNA, JR., et al.	* **IN THE**
	* **COURT OF APPEALS**
	* **OF MARYLAND**
	* **Petition Docket No. 400**
v.	* **September Term, 2006**
	* **(No. 1502, Sept. Term,**
	* **2004, Court of Special**
ARE ACQUISITIONS, LLC	* **Appeals)**

ORDER

The court having considered the motion for reconsideration of the conditional cross-petition filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the motion for reconsideration be, and it is hereby, denied.

/s/ Irma S. Raker
Judge

DATE September 27, 2007

42 U.S.C.A. § 6901. Congressional findings

* * *

(b) Environment and health

The Congress finds with respect to the environment and health, that –

(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;

(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;

(3) as a result of the Clean Air Act [42 U.S.C.A. § 7401 et seq.], the Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.], and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;

(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

(5) the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment;

(6) if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming;

(7) certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes; and

(8) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken.

* * *

42 U.S.C.A. § 6902. Objectives and national policy

(a) Objectives

The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by –

* * *

(4) assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment;

(5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date;

* * *

(b) National policy

The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

42 U.S.C.A. § 6903. Definitions

As used in this chapter:

* * *

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may –

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

* * *

(15) The term "person" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States.

* * *

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural

operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C.A. § 2011 et seq.].

* * *

42 U.S.C.A. § 6922. Standards applicable to generators of hazardous waste

(a) In general

Not later than eighteen months after October 21, 1976, and after notice and opportunity for public hearings and after consultation with appropriate Federal and State agencies, the Administrator shall promulgate regulations establishing such standards, applicable to generators of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. Such standards shall establish requirements respecting –

(1) recordkeeping practices that accurately identify the quantities of such hazardous waste generated, the constituents thereof which are significant in quantity or in potential harm to human health or the environment, and the disposition of such wastes;

(2) labeling practices for any containers used for the storage, transport, or disposal of such hazardous waste such as will identify accurately such waste;

(3) use of appropriate containers for such hazardous waste;

(4) furnishing of information on the general chemical composition of such hazardous waste to persons transporting, treating, storing, or disposing of such wastes;

(5) use of a manifest system and any other reasonable means necessary to assure that all such

hazardous waste generated is designated for treatment, storage, or disposal in, and arrives at, treatment, storage, or disposal facilities (other than facilities on the premises where the waste is generated) for which a permit has been issued as provided in this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.]; and

(6) submission of reports to the Administrator (or the State agency in any case in which such agency carries out a permit program pursuant to this subchapter) at least once every two years, setting out –

> **(A)** the quantities and nature of hazardous waste identified or listed under this subchapter that he has generated during the year;
>
> **(B)** the disposition of all hazardous waste reported under subparagraph (A);
>
> **(C)** the efforts undertaken during the year to reduce the volume and toxicity of waste generated; and
>
> **(D)** the changes in volume and toxicity of waste actually achieved during the year in question in comparison with previous years, to the extent such information is available for years prior to November 8, 1984.

* * *

42 U.S.C.A. § 6928. Federal enforcement

* * *

(d) Criminal penalties

Any person who –

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.],

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter –

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.]; or

(B) in knowing violation of any material condition or requirement of such permit; or

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or

by a State in the case of an authorized State program) under this subchapter;

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter (whether such activity took place before or takes place after November 8, 1984) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest;

(6) knowingly exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement; or

(7) knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under this subchapter –

(A) in knowing violation of any material condition or requirement of a permit under this subchapter; or

(B) in knowing violation of any material condition or requirement of any applicable regulations or standards under this chapter;

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

(e) Knowing endangerment

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than

fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000.

* * *

42 U.S.C.A. § 6972. Citizen suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf –

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

* * *

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42 U.S.C.A. § 6973. Imminent hazard

(a) Authority of Administrator

Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both. A transporter shall not be deemed to have contributed or to be contributing to such handling, storage, treatment, or disposal taking place after such solid waste or hazardous waste has left the possession or control of such transporter if the transportation of such waste was under a sole contractural[1] arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment,

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[1] So in original. Probably should be "contractual".

transportation and disposal of such waste. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

* * *

40 C.F.R. § 261.2 Definition of solid waste.

(a)(1) A solid waste is any discarded material that is not excluded by § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.

(2) A discarded material is any material which is:

(i) Abandoned, as explained in paragraph (b) of this section; or

(ii) Recycled, as explained in paragraph (c) of this section; or

(iii) Considered inherently waste-like, as explained in paragraph (d) of this section; or

(iv) A military munition identified as a solid waste in 40 CFR 266.202.

(b) Materials are solid waste if they are abandoned by being:

(1) Disposed of; or

(2) Burned or incinerated; or

(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

* * *

40 C.F.R. § 261.4 Exclusions.

(a) Materials which are not solid wastes. The following materials are not solid wastes for the purpose of this Part:

* * *

(4) Source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 et seq.

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40 C.F.R. § 262.34 Accumulation time.

(a) Except as provided in paragraphs (d), (e), and (f) of this section, a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status, provided that:

(1) The waste is placed:

(i) In containers and the generator complies with the applicable requirements of subparts I, AA, BB, and CC of 40 CFR part 265; and/or

(ii) In tanks and the generator complies with the applicable requirements of subparts J, AA, BB, and CC of 40 CFR part 265 except §§ 265.197(c) and 265.200; and/or

(iii) On drip pads and the generator complies with subpart W of 40 CFR part 265 and maintains the following records at the facility:

(A) A description of procedures that will be followed to ensure that all wastes are removed from the drip pad and associated collection system at least once every 90 days; and

(B) Documentation of each waste removal, including the quantity of waste removed from the drip pad and the sump or collection system and the date and time of removal; and/or

(iv) In containment buildings and the generator complies with subpart DD of 40 CFR part 265, has placed its professional engineer certification

that the building complies with the design standards specified in 40 CFR 265.1101 in the facility's operating record no later than 60 days after the date of initial operation of the unit. After February 18, 1993, PE certification will be required prior to operation of the unit. The owner or operator shall maintain the following records at the facility:

(A) A written description of procedures to ensure that each waste volume remains in the unit for no more than 90 days, a written description of the waste generation and management practices for the facility showing that they are consistent with respecting the 90 day limit, and documentation that the procedures are complied with; or

(B) Documentation that the unit is emptied at least once every 90 days.

In addition, such a generator is exempt from all the requirements in subparts G and H of 40 CFR part 265, except for §§ 265.111 and 265.114.

(2) The date upon which each period of accumulation begins is clearly marked and visible for inspection on each container;

(3) While being accumulated on-site, each container and tank is labeled or marked clearly with the words, "Hazardous Waste"; and

(4) The generator complies with the requirements for owners or operators in Subparts C and D in 40 CFR part 265, with § 265.16, and with 40 CFR 268.7(a)(5).

(b) A generator who accumulates hazardous waste for more than 90 days is an operator of a storage facility and is subject to the requirements of 40 CFR Parts 264 and 265 and the permit requirements of 40 CFR Part 270 unless he has been granted an extension to the 90-day period. Such extension may be granted by EPA if hazardous wastes must remain onsite for longer than 90 days due to unforeseen, temporary, and uncontrollable circumstances. An extension of up to 30 days may be granted at the discretion of the Regional Administrator on a case-by-case basis.

(c)(1) A generator may accumulate as much as 55 gallons of hazardous waste or one quart of acutely hazardous waste listed in § 261.33(e) in containers at or near any point of generation where wastes initially accumulate, which is under the control of the operator of the process generating the waste, without a permit or interim status and without complying with paragraph (a) of this section provided he:

(i) Complies with §§ 265.171, 265.172, and 265.173(a) of this chapter; and

(ii) Marks his containers either with the words "Hazardous Waste" or with other words that identify the contents of the containers.

(2) A generator who accumulates either hazardous waste or acutely hazardous waste listed in § 261.33(e) in excess of the amounts listed in paragraph (c)(1) of this section at or near any point of generation must, with respect to that amount of excess waste, comply within three days with paragraph (a) of this section or other

applicable provisions of this chapter. During the three day period the generator must continue to comply with paragraphs (c)(1)(i)-(ii) of this section. The generator must mark the container holding the excess accumulation of hazardous waste with the date the excess amount began accumulating.

(d) A generator who generates greater than 100 kilograms but less than 1000 kilograms of hazardous waste in a calendar month may accumulate hazardous waste on-site for 180 days or less without a permit or without having interim status provided that:

(1) The quantity of waste accumulated on-site never exceeds 6000 kilograms;

(2) The generator complies with the requirements of subpart I of part 265 of this chapter, except for §§ 265.176 and 265.178;

(3) The generator complies with the requirements of § 265.201 in subpart J of part 265;

(4) The generator complies with the requirements of paragraphs (a)(2) and (a)(3) of this section, the requirements of subpart C of part 265, the requirements of 40 CFR 268.7(a)(5); and

(5) The generator complies with the following requirements:

(i) At all times there must be at least one employee either on the premises or on call (i.e., available to respond to an emergency by reaching the facility within a short period of time) with the

responsibility for coordinating all emergency response measures specified in paragraph (d)(3)(iv) of this section. This employee is the emergency coordinator.

(ii) The generator must post the following information next to the telephone:

(A) The name and telephone number of the emergency coordinator;

(B) Location of fire extinguishers and spill control material, and, if present, fire alarm; and

(C) The telephone number of the fire department, unless the facility has a direct alarm.

(iii) The generator must ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures, relevant to their responsibilities during normal facility operations and emergencies;

(iv) The emergency coordinator or his designee must respond to any emergencies that arise. The applicable responses are as follows:

(A) In the event of a fire, call the fire department or attempt to extinguish it using a fire extinguisher;

(B) In the event of a spill, contain the flow of hazardous waste to the extent possible, and as soon as is practicable, clean up the hazardous waste and any contaminated materials or soil;

(C) In the event of a fire, explosion, or other release which could threaten human health outside the facility or when the generator has knowledge that a spill has reached surface water, the generator must immediately notify the National Response Center (using their 24-hour toll free number 800/424-8802). The report must include the following information:

(1) The name, address, and U.S. EPA Identification Number of the generator;

(2) Date, time, and type of incident (e.g., spill or fire);

(3) Quantity and type of hazardous waste involved in the incident;

(4) Extent of injuries, if any; and

(5) Estimated quantity and disposition of recovered materials, if any.

(e) A generator who generates greater than 100 kilograms but less than 1000 kilograms of hazardous waste in a calendar month and who must transport his waste, or offer his waste for transportation, over a distance of 200 miles or more for off-site treatment, storage or disposal may accumulate hazardous waste on-site for 270 days or less without a permit or without having interim status provided that he complies with the requirements of paragraph (d) of this section.

(f) A generator who generates greater than 100 kilograms but less than 1000 kilograms of hazardous

waste in a calendar month and who accumulates hazardous waste in quantities exceeding 6000 kg or accumulates hazardous waste for more than 180 days (or for more than 270 days if he must transport his waste, or offer his waste for transportation, over a distance of 200 miles or more) is an operator of a storage facility and is subject to the requirements of 40 CFR Parts 264 and 265 and the permit requirements of 40 CFR Part 270 unless he has been granted an extension to the 180-day (or 270-day if applicable) period. Such extension may be granted by EPA if hazardous wastes must remain on-site for longer than 180 days (or 270 days if applicable) due to unforeseen, temporary, and uncontrollable circumstances. An extension of up to 30 days may be granted at the discretion of the Regional Administrator on a case-by-case basis.

* * *

94 12-20-07

No. 3 07-890

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ARE ACQUISITIONS, LLC,

Petitioner,

v.

MICHAEL G. HANNA, JR., PETER NARDIN, JONATHAN SWINDLE, RICHARD COX, CHARLES LINDSAY, CHARLES DUBROFF, and DAVID FOX,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

SUPPLEMENTAL APPENDIX

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IN THE COURT OF APPEALS OF MARYLAND.

No. 87

September Term, 2006

MICHAEL HANNA, JR., *et al.*

v.

ARE ACQUISITIONS, LLC

Raker
*Cathell
Harrell
Battaglia
Greene
Eldridge, John C. (Retired, Specially Assigned)
Wilner, Alan M. (Retired, Specially Assigned),

JJ.

Opinion by Eldridge, J.

Filed: August 22, 2007

The issue in this case is whether the officers and directors of a tenant corporation committed a trespass by leaving the tenant's materials on the leased premises and not removing the materials at the time

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* Cathell, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

of, or subsequent to, the termination of the lease. The individual petitioners are officers and directors of Intracel Corporation. Two corporate entities affiliated with Intracel are also petitioners.[1] The petitioners argue that the Court of Special Appeals erred when it held that a cause of action for trespass may lie against them. The respondent is ARE Acquisitions, LLC, the owner of the leased premises. ARE argues that the officers and directors of Intracel, by "leaving chattels on the premises after [their] right to be on the premises has expired," committed a trespass. We shall hold that no cause of action for trespass lies against the petitioners. The petitioners' actions do not amount to a trespass under Maryland law.

I.

ARE's predecessor, as landlord, and Intracel, as tenant, were parties to a ten year lease entered into on January 15, 1997, of a building in Rockville, Maryland. In June 1997, ARE purchased the property and thus became the landlord under the lease. Intracel, as tenant, was a biopharmaceutical company engaged in the business of developing vaccines and other products for the treatment of various diseases. Intracel used the property for its office and laboratory. The equipment and materials utilized by Intracel were

---

[1] Hereafter, for convenience, the phrase "officers and directors" will sometimes be used to include both the individual petitioners and the two corporate petitioners.

typical in the biopharmaceutical industry and included biological agents, radioactive material, various chemicals including acids, lacquer thinner, oxygen, argon, cagewashing detergent and sodium hydroxide. In addition, Intracel used incinerators, irradiators, syringes, and other equipment.

In 1998, Intracel was suffering financial difficulties. By September 2000, Intracel stopped paying rent in a timely manner and defaulted under the lease. ARE agreed to give Intracel additional time to cure its default under the lease and to refrain from evicting Intracel during the additional time period. Intracel, however, failed to cure its default and by early 2001 owed ARE a rental arrearage in excess of $400,000. On April 4, 2001, ARE notified Intracel that the lease was terminated effective April 19, 2001, and that Intracel was required to vacate the premises by that date. Intracel requested and was granted additional time to complete its move and ultimately vacated the premises by April 30, 2001.

ARE contended that Intracel's officers and directors committed a trespass because, when they vacated the property, Intracel's officers and directors "left the Premises in disarray, abandoning large quantities of unwanted hazardous waste and contaminated materials, including but not limited to biological agents, radioactive materials and dangerous chemicals at the Premises." ARE alleged that, because it "did not know what all the materials were, and because some were obviously chemically hazardous, biohazardous, or radioactive, the condition of the

building posed a risk to ARE's employees, other tenants, any new tenant, and the general public." In July 2001, ARE hired a contractor to clean up the materials left behind by Intracel. Intracel filed a bankruptcy petition in the United States Bankruptcy Court for the District of Maryland on September 12, 2001, and ARE was one of the largest unsecured creditors in the bankruptcy action.

In September 2002, ARE instituted this action in the Circuit Court for Montgomery County, seeking both compensatory and punitive damages. The operative pleading is ARE's second amended complaint, filed on March 18, 2004. In that complaint, ARE named seven of Intracel's officers and directors as defendants.[2] Intracel itself was not a defendant. ARE also included as defendants Intracel Acquisition Holding Company, LLC (IAHC) and Dublind Partners, Inc. According to the second amended complaint, IAHC was a company set up and controlled by the individual defendants "to acquire Intracel, control its operations, and protect IAHC's investment in Intracel." ARE alleged that Dublind Partners, Inc. was "set up and controlled by Defendants Lindsay and Dubroff, [and] controlled IAHC and Intracel's operations."

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[2] The individual defendants were Michael G. Hanna, Jr., Peter R. Nardin, Richard P. Cox, Jonathan C. Swindle, Charles Dubroff, Charles J. Lindsay, and David Fox.

The second amended complaint included several alleged causes of action, including, *inter alia*, trespass, tortious interference with contract, "aiding and abetting trespass," waste, negligence, and "aiding and abetting waste." The only asserted cause of action which remains in the case is trespass. In its second amended complaint, ARE claimed that the defendants "directed, were aware of, and participated in the conduct of Intracel which caused waste and contaminated materials to be deposited, abandoned and strewn about the Premises, which . . . constituted an unauthorized entry to the Premises." In addition, ARE asserted in the trespass count that "Defendants Dublind, IAHC, Nardin, Durbroff, Lindsay, Fox, Hanna and Swindle controlled the cash flow of Intracel and refused to authorize the payment of the funds necessary to remove the hazardous waste and materials and restore the Premises to its proper condition."

The Circuit Court for Montgomery County granted the defendants' motion to dismiss all the counts in the second amended complaint except those relating to trespass and waste, and to dismiss the request for punitive damages. Thereafter, ARE filed a motion for summary judgment on the trespass count, and the Circuit Court denied the motion. The defendants then filed a motion for summary judgment on the remaining counts, submitting transcripts of depositions, interrogatories and answers to the interrogatories. After reviewing the material and holding a hearing on the motion, the Circuit Court granted summary judgment in favor of the defendants on the

remaining counts which related to trespass and waste.

ARE appealed to the Court of Special Appeals, arguing that the Circuit Court erred in dismissing the negligence count and the request for punitive damages. ARE also contended that the grant of summary judgment in favor of the defendants on the trespass and waste counts was erroneous.

In an unreported opinion, the Court of Special Appeals affirmed the Circuit Court's rulings on all counts except the trespass count. In holding that the Circuit Court erred in granting summary judgment as to trespass, the intermediate appellate court chiefly relied on the Restatement (Second) of Torts. The pertinent sections of the Restatement provide as follows (emphasis added):

> "§ 158. Liability for Intentional Intrusions on Land
>
> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
>
> (a) enters the land in the possession of the other, or causes a thing or a third person to do so, or
>
> (b) remains on the land, or
>
> (c) *fails to remove from the land a thing which he is under a duty to remove.*
>
> * * *

"§ 161. Failure to Remove Thing Tortiously Placed on Land

(1) A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.

(2) A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor's predecessor in legal interest therein has tortiously placed there, if the actor, having acquired his legal interest in the thing with knowledge of such tortious conduct or having thereafter learned of it, fails to remove the thing."

The Court of Special Appeals concluded that § 158(c) was the section which covers the present case. In reaching this conclusion, the intermediate appellate court distinguished this Court's decision in *Rosenblatt v. Exxon*, 335 Md. 58, 642 A.2d 180 (1994). *Rosenblatt* involved circumstances somewhat similar to those in the present case. In *Rosenblatt*, a tenant of commercial property, upon termination of the lease, vacated the property but allegedly left behind "toxic chemicals" which "contaminated" the property. This Court in *Rosenblatt* emphasized that "we have never recognized a trespass where the thing which intrudes actually entered the land during the 'trespasser's' possession and the plaintiff took possession of the land subsequent to the 'intrusion.'" *Rosenblatt*, 335 Md. at 78, 642 A.2d at 189. The *Rosenblatt* opinion

next discussed the Restatement and held that § 161 did not apply in that case because it "explicitly provides that a trespass involves the *tortious placing* of something on the land and implicitly provides that the affected land is the land *of another*." 335 Md. at 78, 642 A.2d at 190. The Court then quoted language from § 158 of the Restatement to "further support [ ] this interpretation." *Ibid.* Specifically, this Court quoted the language stating that "'[o]ne is subject to liability to another for trespass . . . if he intentionally . . . (c) fails to remove from the land a thing which he is under a duty to remove.'" 335 Md. at 78-79, 642 A.2d at 190. The *Rosenblatt* opinion then held that a tenant "owed . . . no duty to remove the contamination." 335 Md. at 79, 642 A.2d at 190.

In distinguishing *Rosenblatt*, the Court of Special Appeals in the case at bar acknowledged that this Court's statement, that "we have never recognized a trespass where the thing which intrudes actually entered the land during the 'trespasser's' possession and the plaintiff took possession of the land subsequent to the intrusion," appeared to support the grant of summary judgment. According to the Court of Special Appeals, however, those words should be read only to "explain[ ] why Section 161 of the Restatement (Second) of Torts was inapplicable" in *Rosenblatt*. The intermediate appellate court in the present case, turning to § 158 of the Restatement, went on to hold that the "no duty" language in *Rosenblatt* should be limited to the situation where the plaintiff was a successor lessee as in *Rosenblatt*, but that in the

present case "no 'successor lessee' is involved." Consequently, the Court of Special Appeals could "see no reason why Section 158(c) would not be applicable to Intracel." The appellate court reversed the judgment "as to the trespass count" and affirmed with respect to all other counts.

The defendants filed in this Court a petition for a writ of certiorari, challenging the Court of Special Appeals' reversal on the trespass count. ARE filed a conditional cross-petition for a writ of certiorari, contending that the Court of Special Appeals erred in affirming the dismissal of the negligence count and the dismissal of the claim for punitive damages. ARE also raised a procedural issue in the event that the case was remanded to the Circuit Court for further proceedings. This Court granted the defendants' petition and denied ARE's conditional cross-petition. *Hanna v. ARE*, 396 Md. 9, 912 A.2d 646 (2006). Consequently, as previously indicated, the only issue remaining in the case is whether there exists a cause of action for trespass under the circumstances here.

II.

The petitioners' argument is that *Rosenblatt v. Exxon*, *supra*, 335 Md. 58, 642 A.2d 180, is dispositive and mandates a reversal of the Court of Special Appeals' decision on the trespass count. According to the petitioners, *Rosenblatt* held that "a possessor of land under a lease (Intracel) cannot be . . . [held liable for] trespass by a subsequent possessor (ARE) for

having left materials behind; the 'intrusion' occurred during the lawful possession of the property by the tenant." (Petitioners' brief in this Court at 12). The respondent, agreeing with the Court of Special Appeals, argues that "*Rosenblatt* does not apply because it deals with a tenant's liability to a subsequent tenant, not its landlord." (Respondent's brief in this Court at 11). The respondent also contends that *Rosenblatt* is distinguishable because it involved materials left in the property's "subsurface" and "subsurface contamination," whereas the present case involved "hazardous materials inside ARE's building." (*Id.* at 13-14).

We agree with the petitioners that *Rosenblatt v. Exxon, supra,* 335 Md. at 78-79, 642 A.2d at 189-190, is dispositive. An examination of this Court's unanimous *Rosenblatt* opinion, authored by former Chief Judge Robert C. Murphy, demonstrates that there is no meaningful distinction between *Rosenblatt* and the case at bar with regard to the trespass claims.

The facts of the *Rosenblatt* case were as follows. Exxon Company, U.S.A., had leased a parcel of property from its owner from 1951 to 1985. Exxon then subleased the property to successive independent operators to use as a gasoline station during that period. Exxon installed gasoline storage tanks on the property, and the tanks remained on the property until the termination of Exxon's lease in 1985. In 1986, the owner leased the same parcel of property to Mr. Rosenblatt who intended to construct and operate a "Grease-N-Go" automotive quick lubrication

business. After leasing the property, Rosenblatt requested an environmental assessment of the property which revealed extensive amounts of petroleum remaining on the property. The petroleum had contaminated the property's soil and groundwater. As a result of the contamination, the Maryland Department of the Environment informed Rosenblatt that he could continue with the construction of his "Grease-N-Go" facility but that those efforts would have to be coordinated with Exxon's remediation efforts. Rosenblatt subsequently filed suit against Exxon and the prior sublessees, seeking economic loss damages including expenses incurred as a result of the contamination. Rosenblatt's complaint included causes of action based on strict liability, negligence, trespass, and nuisance. After some preliminary skirmishes in both the Circuit Court for Prince George's County and the United States District Court for the District of Maryland, the defendants filed in the Circuit Court motions for summary judgment. The Circuit Court granted the motions; Rosenblatt appealed, and this Court issued a writ of certiorari prior to any proceedings in the Court of Special Appeals.

In affirming the judgment in *Rosenblatt*, this Court dealt separately with each of the four asserted causes of action. Chief Judge Murphy for the Court began the discussion of the trespass count as follows (*Rosenblatt*, 335 Md. at 78, 642 A.2d at 189):

"*The Trespass Claim*

> "When a defendant interferes with a plaintiff's interest in the exclusive possession of the land by entering or causing something to enter the land, a trespass occurs. *See Rockland Inc. v. H.J. Williams,* 242 Md. 375, 385, 219 A.2d 48 (1966).
>
> "We have recognized that a trespass occurs when there is interference in the exclusive possession of the land of another, *see Rockland, supra,* but we have never recognized a trespass where the thing which intrudes actually entered the land during the 'trespasser's' possession and the plaintiff took possession of the land subsequent to the 'intrusion.'"

Contrary to the view of the Court of Special Appeals, this controlling principle, that Maryland law does not recognize a trespass cause of action when the "thing which intrudes" enters the land during the alleged "trespasser's" possession, was not set forth as part of a discussion of the Restatement (Second) of Torts. After setting forth the controlling principle, the Court's opinion then turned to the plaintiff Rosenblatt's reliance upon § 161 of the Restatement. The *Rosenblatt* opinion considered § 161 together with § 158, saying (335 Md. at 78-79, 642 A.2d at 190, emphasis in original):

> "Section 161 does not support Rosenblatt's position. It explicitly provides that a trespass involves the *tortious placing* of

> something on the land and implicitly provides that the affected land is the land *of another*. Section 158 further supports this interpretation. It states that 'one is subject to liability to another for trespass . . . if he intentionally enters land *in the possession of the other*, or causes a thing or a third person to do so, or remains on the land, or fails to remove from the land a thing which he is under a duty to remove.' (emphasis added). Exxon did not cause the contamination to occur during Rosenblatt's occupancy; the introduction of the contamination could only have occurred prior to its relinquishing possession of the land. Additionally, Exxon owed Rosenblatt no duty to remove the contamination."

The trespass holding in *Rosenblatt* is directly on point. It cannot be validly distinguished on the grounds relied upon by the Court of Special Appeals and the respondent ARE. The governing principle, that there is no trespass "where the thing which intrudes actually entered the land during" the alleged trespasser's lawful possession, was not set forth as an answer to the plaintiff's reliance on § 161 of the Restatement. The Court thereafter answered the argument based on § 161 by pointing out that, for liability under the section, there must be a "*tortious placing* of something on the land" and the "affected land" must be "the land *of another*." *Rosenblatt*, 335 Md. at 78, 642 A.2d at 190. Moreover, the *Rosenblatt* opinion simply used § 158 of the Restatement to "further support[ ] this interpretation" of § 161. It treated the sections as somewhat interrelated, rather

than wholly separate and distinct as suggested by the Court of Special Appeals.

The *Rosenblatt* holding, that Exxon did not commit a trespass by failing to remove the contaminating petroleum, was not in any manner limited to an action by a successor lessee against the former tenant. The entire portion of the *Rosenblatt* opinion dealing with the trespass count does not even use the terms "lessee," "successor lessee," or "lessor." Instead, it refers to a party's "occupancy of the land" or "possession" of the land or " subsequent occupier." One of the two cases from other jurisdictions which *Rosenblatt* relied on, *Wellesley Hills Realty v. Mobil Oil Corp.*, 747 F.Supp. 93, 99 (D.Mass.1990), was an action by the current owner of the land. It was not an action by a successor lessee.[3] For other cases where the plaintiff was not a successor lessee, *see, e.g., 55 Motor Avenue Company v. Liberty Industrial Finishing Corp.*, 885 F.Supp. 410, 423-424 (E.D.N.Y. 1994) (Trespass action by the landowner against the former

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[3] It is noteworthy that, in the portion of the *Rosenblatt* opinion dealing with the negligence count, 335 Md. at 76-78, 642 A.2d at 188-189, the Court does refer to "lessees" and "successor lessees." While the opinion does not specifically draw a distinction between the possible negligence liability of the defendant to the owner, in contrast to the defendant's non-liability to a successor lessee, there is language in the negligence section of *Rosenblatt* which arguably might support such a distinction. We express no opinion as to the merits of such an argument. In the trespass section of the *Rosenblatt* opinion, however, which immediately follows the negligence section, the Court used no language which might support such a distinction.

occupier of the land which, upon termination of the occupation, left behind materials contaminating the property, and the court, relying upon *Rosenblatt v. Exxon, supra,* held that there is no trespass when the contaminating materials were placed on the property "while the defendants were lawful occupants of the premises"); *Graham Oil Company v. BP Oil Company*, 885 F.Supp. 716, 725-727 (W.D. Pa. 1994) (The landlord brought a trespass action against its former tenant for leaving behind contaminating material at the termination of the lease, and the court held that, because the alleged trespass "occurred during the lease term," the owner "should not be permitted to recover in its action for trespass"); *Hanlin Group, Inc. v. International Minerals & Chemical Corporation*, 759 F.Supp. 925, 937 (D. Maine 1990) (Trespass action by the subsequent owner against the prior owner of the property, and the court held that trespass would not lie because the intruding chemicals were placed on the property during the defendant's lawful occupation); *Taco Cabana, Inc. v. Exxon Corp.*, 5 S.W.3d 773, 780 (Tex. App. 1999) (Trespass action by the property owner against the former tenant of the prior owner, and the court took the position that a trespass action could not be maintained because the former tenant had no duty under state law to remove the intrusive material at the termination of the lease); *U.P.C., Inc. v. R.O.A. General, Inc.*, 990 P.2d 945, 953-955 (Utah App. 1999) (The owner of land brought a trespass action against the former tenant, arguing that, upon termination of the lease, the former tenant should have removed the foundation

for a sign, but the court held that there was no trespass because the former tenant had no duty to remove the sign).

Finally, there is no merit in the respondent's attempt to distinguish, for purposes of trespass actions, between chemical materials left in containers on the surface of the property and chemical materials which permeate the soil and groundwater of the property. Neither *Rosenblatt* nor any of the other cases cited above make such a distinction. The language of *Rosenblatt,* 335 Md. at 78, 642 A.2d at 189-190, referring to the "thing which intrudes" and the "placing of something on the land," negates such a distinction. Furthermore, we are aware of no public policy which would support trespass liability when contaminating chemicals are left in containers on the property's surface but would not support trespass liability when contaminating chemicals are left in the soil and contaminate the underground water supply. If a distinction were warranted on public policy grounds, it would be opposite to the one urged by the respondent.[4]

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[4] Both the Court of Special Appeals and the respondent cited this Court's decision in *Metromedia v. WCBM Maryland,* 327 Md. 514, 610 A.2d 791 (1992), in support of their position that the petitioners' action in leaving materials on the premises constituted a trespass. This reliance on *Metromedia* is misplaced. *Metromedia* was not a trespass action, and it did not involve a tenant's leaving materials on the premises when the tenant vacated the premises. *Metromedia* was an ejectment action by an out-of-possession sub-sublessor against the corporate sub-sublessee

(Continued on following page)

This Court's decision in *Rosenblatt v. Exxon* makes it clear that, when materials are left on real property at the conclusion of the defendant's lawful possession of the property, there is no cause of action in trespass if the materials entered the land before or during the defendant's lawful possession. The Circuit Court correctly applied this principle when it granted the defendants' motion for summary judgment on the trespass count.

JUDGMENT OF THE COURT OF SPECIAL APPEALS ON THE TRESPASS COUNT REVERSED. JUDGMENT OF THE COURT OF SPECIAL APPEALS OTHERWISE AFFIRMED. CASE REMANDED TO THE COURT OF SPECIAL APPEALS WITH DIRECTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY

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and its chief executive officer, both of whom had refused to vacate the premises after the termination of the sub-sublease. The plaintiff sought possession of the property and damages. The parties to the appellate proceedings in this Court were the sub-sublessor and the chief executive officer; the sub-sublessee was not a party in this Court. The contested issue in this Court was whether the chief executive officer could be held personally liable for the actions of the corporation. There was no issue concerning the scope or nature of an action of trespass *quare clausum fregit*. For a discussion of the differences between trespass *quare clausum fregit* and ejectment, *see* I John Prentiss Poe, *Pleading and Practice in Courts of Common Law*, §§ 242-250, 256-275 (3d ed. 1897).

COUNTY. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY THE RESPONDENT ARE ACQUISITIONS, LLC.

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SUPREME COURT, U.S.

No. 07-890

IN THE

Supreme Court of the United States

ARE ACQUISITIONS, LLC,

Petitioner,

v.

MICHAEL G. HANNA, Jr., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can a state court be compelled to reinstate a dismissed negligence claim in a civil suit for damages arising out of a private party's past clean up of hazardous waste?

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JURISDICTION

This Court does not have jurisdiction to grant the requested relief. The Petition challenges a state court judgment in which Petitioner's "negligence" count in a civil damages suit was dismissed for failure to state a claim upon which relief could be granted. The provision applicable to state court judgments is 28 U.S.C. § 1257. Under that section, this Court does not have jurisdiction because the Maryland courts did not call into question the validity or constitutionality of any treaty or statute of the United States.

STATEMENT OF THE CASE

A. Introduction

The Petition arises out of a civil suit filed by Petitioner against a number of persons and entities in the Circuit Court for Montgomery County, Maryland. The suit sought damages against the officers, directors and investors of a bankrupt corporation that had leased commercial office and laboratory space from Petitioner. As to the sole issue now before this Court, the suit was dismissed for failure to state a claim upon which relief could be granted. That dismissal was affirmed by an intermediate appellate court.

The Petition is directed to a decision by the Maryland Court of Appeals denying Petitioner's "Motion to Reconsider" the denial of a conditional cross-petition for

a writ of certiorari. (Petition, pp. 3, 23). The appeal to that court, Maryland's highest appellate court, is discretionary. If granted, the Petitioner's cross-appeal would have addressed the holding of Maryland's intermediate appellate court that Petitioner's Second Amended Complaint did not adequately allege a cause of action sounding in "negligence" against the individual officers and directors of the bankrupt tenant.

The intermediate appellate court (the Maryland Court of Special Appeals) issued its opinion on August 24, 2006. (App. 1-44). That opinion was not addressed solely to the dismissal of the "negligence" count. It covered a wide range of issues and counts in the Second Amended Complaint that were either dismissed on the pleadings or subject to summary judgment. However, the "negligence" issue was the sole focus of Petitioner's Conditional Cross-Petition for a Writ of Certiorari in the Maryland Court of Appeals, and of Petitioner's Motion for Reconsideration of the denial of the Conditional Cross-Petition.

The trial court dismissed the "negligence" count for failure to state a claim upon which relief could be granted pursuant to Md. Rule 2-322(b)(2). The legal standards governing the decision were comparable to those governing motions to dismiss under Fed. R. Civ. P. 12(b)(6) prior to the decision of this Court in *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007). All well pleaded facts, and reasonable inferences drawn therefrom, were taken as true, and considered *de novo* on appeal. *See Afamefune v. Suburban Hosp., Inc.*, 385 Md. 677, 870 A.2d 592 (2005); *Bennett Heating & Air Conditioning, Inc. v. Nationsbank of Md.*, 342 Md. 169, 674 A.2d 534 (1996).

As demonstrated below, the state court result was consistent with federal and state law, and with decisions of other courts that have addressed the identical issue.

B. History of the Litigation[1]

Petitioner is the owner of commercial property in Rockville, Maryland that was leased to Intracel Corp., a bio-technology company. Respondents were officers or directors of Intracel Corp. Petitioner evicted Intracel Corp. from the premises for non-payment of rent effective May 1, 2001. Intracel Corp. filed for bankruptcy in the United States Bankruptcy Court for the District of Maryland in September 2001.

Petitioner filed its initial complaint against several officers and directors of Intracel in September 2002. The complaint sought $500,000 in damages relating to the cost of removing allegedly hazardous materials from the leased site after Intracel was evicted, plus an additional sum in "lost rent." Petitioner later expanded the allegations and the number of defendants (to include a holding company and an investment firm), in an Amended Complaint, followed by a Second Amended Complaint that was filed in March 2004.

The Second Amended Complaint contained twelve counts that set out a number of theories of liability, including trespass, waste, negligence, alter ego liability, respondeat superior, and fraud. In addition to $3 million

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[1] A detailed history, particularly as it relates to the "negligence" issue Petitioner asks this Court to address, is contained in the Court of Special Appeals' opinion at App. 1 – 15.

in alleged economic loss, the Second Amended Complaint asked for $5 million in punitive damages.

All counts of the Second Amended Complaint were eventually dismissed for failure to state a claim, or on summary judgment. Petitioners selected only some of the counts for appeal. Only the "negligence" count is pertinent here.

The "negligence" count contained a paragraph that referenced federal law.[2] It stated (in ¶ 114) in conclusory terms that certain unspecified actions of all defendants:

> constituted violations of numerous environmental statutes and regulations, including but not limited to the Atomic Energy Act, the Resource Conservation and Recovery Act, 42 U.S.C. § 6922 (and related regulations at 40 C.F.R. § 262.30 to 262.34) and 42 U.S.C. §§ 6928(d)(1) to 6928(d)(2); Md. Code, Environmental Article, Titles 7 and 8; and Sections 26:13.11 and .12 of the Code of Maryland Regulations. These statutes were enacted as safety measures, and were designed to protect a class of persons which included ARE [Petitioner], its employees and other occupants of the Property.

The identical wording reappeared in an awkward count labeled "Aiding and Abetting Negligence" (which

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[2] The recitation of the pleading history here is intended to address Sup. Ct. Rule 14(g)(i), the requirements of which Petitioners have largely neglected.

is not at issue here), but there were no other references to federal law in any of the other 218 paragraphs of the Second Amended Complaint.

At this point, the issues are narrower than those raised in ¶ 114. The Atomic Energy Act was not briefed to the Maryland Court of Special Appeals, was not addressed in the Conditional Cross-Petition or in the Motion for Reconsideration, and is not mentioned in the Petition to this Court. In addition, Petitioner never claimed to have incurred damages resulting from any "safety" issues at the site; Petitioner has consistently limited its claim to $3 million in alleged economic loss resulting from clean-up expenses and lost rent, plus punitive damages.[3] Finally, although Petitioner expresses disagreement with the Court of Special Appeals' interpretation of the cited Maryland Regulations (COMAR), the argument is irrelevant and unavailing here. "Save in exceptional circumstances, . . . we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common." *Am. Ry. Express Co. v. Commonwealth of Ky.*, 273 U.S. 269, 272 (1927).

The trial court dismissed the "negligence" count without substantive discussion, stating only (in an oral opinion delivered from the bench): "As to Count 3, the claim of negligence as to all defendants, for the reasons asserted by the defendants in their brief, that motion is granted. That count is dismissed."

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[3] The claim for punitive damages is no longer at issue.

The reasons stated "in the brief "may be fairly categorized as falling into two lines of argument, as follows. First, the preceding (*i.e.*, first) Amended Complaint had been dismissed for lack of specificity, with leave to amend. In granting leave to amend, however, the trial judge required the plaintiff to re-plead the negligence allegations with more specificity; which defendants had committed what tortious violations of law by virtue of what acts or omissions? The brief posited (correctly) that the Second Amended Complaint failed to meet that charge.

Second, the brief asserted that none of the cited statutes addressed the allocation of clean-up costs as between private parties, particularly as between a landlord and a tenant. In other words, the plaintiff was not within the group of persons whom the cited statutes sought to protect, especially where the sole issue raised in the action was economic loss.

The former line of argument would not be pertinent here but for the admonition of Sup. Ct. Rule 15.2 to point out in this Opposition any misstatements of fact in the Petition. Virtually all of the Petition's factual assertions at pp. 6 -10 were hotly disputed and remained so after preliminary motions disposed of the case. For example, Respondent Richard Cox, the general counsel of Intracel Corp., did not control the company's operations or finances. Indeed, he was charged in Petitioner's summary judgment briefing merely with failing to "press the issue" of securing additional funding from investors for clean-up. Respondent David Fox was a director of Intracel for only a very short time, participated in only one board meeting (by telephone), and knew nothing

about Intracel's eviction or what materials were stored on site.[4] The other directors did not misallocate funds from the sale of a corporate asset; they paid the proceeds of the sale to the persons or entities that had a security interest in the asset. At any rate, if they had misallocated assets, the claim was more appropriately made under the "alter ego" claim (which was dismissed and not appealed), or by the trustee in bankruptcy on behalf of the bankrupt corporate entity. *See, Schertz-Cibolo-Universal City v. Wright,* 25 F.3d 1281, 1284 (5th Cir. 1994); *Angell v. Kelly,* 336 F. Supp.2d 540, 544 (M.D. N.C. 2004); *Tafflin v. Levitt,* 92 Md. App. 375, 608 A.2d 817, *cert. denied* 328 Md. 447, 614 A.2d 974 (1992); *Pritchard v. Myers,* 174 Md. 66, 197 A. 620 (1938). Finally, ARE did not attempt to induce Respondents to return to the site after eviction. ARE would not permit Respondents to return to do any clean-up with their own employees, although they were ready, willing, and able to do so. Instead, ARE barred Respondents from the premises and insisted that they retain a private contractor whose initial estimate for clean-up was approximately $250,000.

These, and dozens of other disputed facts, impractical to list here, including ARE's contributory negligence in allocating a $230,000 security deposit to back rent rather than to clean-up, were never resolved. That is why, when the intermediate appellate court

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[4] Petitioner also failed to appeal any issue relating to David Fox in the Maryland appellate courts, in that its briefs did not cite or discuss a single factual allegation or issue as to Mr. Fox. *See, Monumental Life Ins. Co. v. United States Fid. & Guar. Co.,* 94 Md. App. 505, 544, 617 A.2d 1163 (1982). As a result, Mr. Fox is not properly named as a Respondent in this Court.

remanded the "trespass" count, it invited all of the defendants to file further summary judgment motions.[5] (App. 34).

It is, however, the second line of argument that goes to the heart of the dispute here. Sup. Ct. Rule 14.4(g)(i) requires the Petitioner to include in the Petition:

> pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion . . .), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

The Petition does not quote, because it cannot quote, any ruling by any Maryland court which holds that, as Petitioner characterizes it:

> a tenant . . . owes no legal duty to manage [hazardous or radioactive] waste in accordance with the requirements of the federal Resource Conservation and Recovery Act ('RCRA'), 42 U.S.C. §§ 6901-6992k, . . . in stark conflict with decisions of several courts of appeals that

[5] The "trespass" issue was the sole focus of Respondents' appeal to the Maryland Court of Appeals, which reversed the Court of Special Appeals. That decision terminated the suit in its entirety, until the present Petition was filed.

> have affirmed criminal convictions and civil liability premised on the opposite proposition.

(Petition, p. 3).

The actual ruling of the Maryland Court of Special Appeals was merely that: "RCRA was not designed to protect private entities, like ARE, from economic harm." (App. 18). The holding is neither controversial nor fit for review in this Court.

REASONS FOR DENYING THE PETITION

A. The Petition is Untimely.

The substantive decision Petitioner attempts to place at issue was handed down by the Maryland Court of Special Appeals in August 2006. (App. 1 – 44). Thereafter, Petitioner sought further review in the form of a discretionary appeal to the Maryland Court of Appeals. On December 6, 2006 Respondents' petition for a writ of certiorari was granted by the Court of Appeals (on the sole issue that the intermediate appellate court had decided adversely to Respondents), but Petitioner's conditional cross-petition was denied.

Sup. Ct. Rule 13.1 states:

> A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is

> filed with the Clerk within 90 days after entry of the order denying discretionary review.

This Petition should have been filed no later than March 6, 2007.[6]

This argument is not a mere procedural nicety. As Justice Rehnquist wrote, "[a] high degree of selectivity is . . . enjoined upon [the Supreme Court] in exercising [its] certiorari jurisdiction." *Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting). Here, Petitioner's dilatory pursuit of the

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[6] The operative pleading which ostensibly gives rise to the Petition, *i.e.*, Petitioner's state court Motion for Reconsideration of the December 6, 2006 order, was also untimely. The pertinent Md. Rule is 8-605. It provides that a motion for "reconsideration of a decision by the Court that disposes of the appeal" must be filed "(1) before the issuance of the mandate or (2) within 30 days after the filing of the opinion of the Court, whichever is *earlier*." (Emphasis added). Petitioners waited until the day before the issuance of the mandate before filing their Motion for Reconsideration in September 2007. That is, they necessarily elected the *later* of the two triggering events, not the *earlier*, because the opinion that completely terminated *their* appeal was issued on December 6, 2006. Thus, even in the unlikely event that the reference in Sup. Ct. Rule 13.3 to "a petition for rehearing" may be construed to embrace a "Motion for Reconsideration of a Denial of a Conditional Cross-petition for a Writ of Certiorari," the Petition here is still untimely because the Motion for Reconsideration was itself untimely. Petitioner cannot demonstrate that the Maryland Court of Appeals lacked an adequate procedural basis on which to deny the Motion for Reconsideration, which that court did quickly, without comment, and without need of any reply from Respondents. *See, Adams v. Robertson*, 520 U.S. 83, 87-88 (1997).

issue now results in a strained request that this Court review the decision of the Maryland Court of Appeals to deny a discretionary review of a lower court's decision. (Petition pp. 3, 23). The decision whether to review the intermediate appellate court's decision, however, is left by statute to the discretion of the Maryland Court of Appeals. Md. Cts. & Jud. Proc. Code §§ 12-201, 12-203.

> The certiorari process serves an important function in Maryland's system of jurisprudence. It allows this Court to select and review cases that we deem to be "desirable and in the public interest. . . ." In exercising this broad discretion, we limit the issues that we elect to review by denying petitions for certiorari in whole or in part, so that we may deal directly with the issues selected.

Jones v. State, 357 Md. 408, 419, 745 A.2d 396, 401-02 (2000) (citations omitted).

Petitioner had the opportunity under Sup. Ct. Rule 13.1 to challenge the substantive decision of the Maryland Court of Special Appeals. Now, however, Petitioner asserts a challenge to the Court of Appeals' exercise of its discretion to determine what is "desirable and in the public interest." The challenge undermines Maryland's appellate process as established by statute and administered by its highest court.

Sup. Ct. Rule 10(b) provides that a petition for certiorari may be granted where:

> a state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or of a United States Court of Appeals....

The Maryland Court of Appeals made no such decision.

B. This Court Lacks Jurisdiction to Grant the Requested Relief.

The grant of jurisdiction to this Court for review on a writ of certiorari is found at 28 U.S.C. § 1257(a), which states:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties, statutes of, or any commission held or authority exercised under, the United States.

The Maryland courts decided none of the above in this action. They did not question the validity of any treaty or statute of the United States, never called into question the statute of any State on any grounds, and did not deprive Petitioners of any right or immunity conferred by the Constitution, laws, or commissions of the United States.

The only issue decided by the Maryland Court of Special Appeals was the legal sufficiency of Petitioner's "negligence" claim as pled in the Second Amended Complaint. That pleading's reference to federal environmental statutes was pertinent only within the framework of Maryland tort law. That law requires sufficient allegations of: (1) a duty owed by defendant to the plaintiff to protect the plaintiff from injury; (2) breach of that duty; (3) actual injury or loss, and; (4) injury or loss proximately resulting from the breach. *Patton v. United States of Am. Rugby Football*, 381 Md. 627, 851 A.2d 566 (2004). Within this legal structure, evidence of a statutory violation *may* furnish evidence of negligence but:

> In Maryland, the violation of a statute does not constitute negligence *per se.* Rather, *the breach of a statutory duty may be considered some evidence of negligence where three requirements are met.* First, the plaintiff must be a member of the class of persons the statute was designed to protect. Second, the injury suffered must be of the type the statute was designed to prevent. Third, the plaintiff must present legally sufficient evidence to

> demonstrate that the statutory violation was the proximate cause of the injury sustained.

Joseph v. Bozzuto Mgmt. Co., 173 Md. App. 305, 326, 918 A.2d 1230, 1242 (2007); *See, Atl. Mut Ins. Co. v. Kenney*, 323 Md. 116, 124, 591 A.2d 507, 510-511 (1991).

The Court of Special Appeals concluded that, whatever RCRA violations may have been alleged, the allegations were futile because: "the statutes relied upon by [Petitioner] were not intended to protect against the type of harm appellant experienced." (App. 17). "RCRA was not designed to protect private entities from economic harm." (App. 18). In other words, alleged RCRA violations do not satisfy the first two required elements of Maryland law listed in the *Joseph* decision as quoted above.

Thus the Petitioner fails to take into account a critical distinction between a decision that contravenes federal law, and one that merely restricts the scope of that federal law's reach into the realm of state tort law. The latter type of decision is, and should be, uniquely left to the state court's discretion.

Maryland is among the minority of states that treat statutory violations as mere evidence of negligence, not as negligence *per se*. *Joseph*, 173 Md. App. at 329. Viewed in that context, because the RCRA provisions cited in the Second Amended Complaint do not prescribe anything about tort law, it is within the purview of the state court "*to adopt the standards or rules of conduct from such statutes and to apply them to tort cases.*" *Id., citing* B. Dobbs, THE LAW OF TORTS, § 134 at 315 (2001).

This Court does not generally grant petitions for certiorari to review the application of state law to a pleading or a set of facts. *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996).

> With "very rare exceptions," . . . we have adhered to the rule in reviewing state court judgments under 28 U.S.C.§ 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 520 U.S. at 88 (citation omitted).

Here no state court has ever ruled on the issued framed by Petitioner as the "question presented," *i.e.*, the nature and extent of a "tenant's" duty to manage hazardous waste under RCRA. The "tenant" was never a party to this proceeding, having filed for bankruptcy protection. The Respondents' duties under federal law were never discussed by the trial court or by the intermediate appellate court, both of which determined merely that alleged breaches of those duties did not give rise to a claim for civil damages. Federal law was never addressed in any way by the Court of Appeals whose action denying a discretionary appeal is the subject of the requested writ.

For purposes of federal diversity jurisdiction, this Court has held:

> We conclude that a complaint alleging a violation of a federal statute as an element of

> a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States." *28 U.S.C. § 1331.*

Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 817 (1986)."[7]

If *Merrell* announces the standards for federal question jurisdiction, it is no wonder that Petitioner did not file this case in federal court and, indeed, resisted Respondents' efforts to have the case removed to the federal bankruptcy court overseeing Intracel Corp.'s bankruptcy.

Moreover, if the pleading of alleged RCRA violations as possible evidence of negligence under Maryland law may not be considered a claim arising under the laws of

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[7] This view has evolved in recent years to accommodate federal court jurisdiction over issues of federal law in circumstances not present here: "The question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 (2005). Thus, in *Grable*, federal jurisdiction was properly exercised because: "the federal statute is ... an essential element of [plaintiff's] quiet title claim, and the meaning of the federal statute is actually in dispute; it appears to be the only legal or factual issue contested in the case." *Id.* at 315. No similar factor is present here.

the United States for purposes of federal question jurisdiction, the rejection of those allegations under Maryland law cannot reasonably be interpreted as a challenge to the validity of RCRA itself. At a minimum, the issue is so intertwined with Maryland tort law that this Court's exercise of jurisdiction is not warranted. *Duncan v. Tennessee,* 405 U.S. 127 (1972).

This Court should also recognize that the negligence claim at the center of this Petition was rejected on independent state grounds. In addition to rejecting the alleged RCRA violations as constituting adequate, actionable evidence of negligence, the Court of Special Appeals determined that, although Petitioner had had three chances to plead its case, it consistently "failed to allege any common law duty that was negligently breached by the defendants." (App. 21).

> In large measure, [Petitioner] appears to be attempting to assert that the defendants "negligently" breached the lease contract [which required the tenant to clean up the site upon vacating the premises]. Such an assertion is insufficient to state a cause of action for negligence. *See Heckrotte v. Riddle,* 224 Md. 591, 595 (1961). . . .

(App. 21).

Because the Maryland Court of Special Appeals "rested its decision on both state and federal grounds, either of which would have been dispositive, [this Court] would have . . . no jurisdiction." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (and cases cited therein).

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.... The reason is so obvious that it has rarely upon [sic] thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125 – 126 (1945) (citations omitted). *See, Lee v Kemna*, 534 U.S. 362, 375 (2002); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

C. The Court Properly Rejected Petitioner's RCRA-based Negligence Claim.

In *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996) this Court held that RCRA does not authorize a private cause of action for recovery of past clean up costs. "RCRA is not principally designed to effectuate clean up of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards." *Id.* at 483. "That RCRA's citizen suit provision was not

intended to provide a remedy for past cleanup costs is further apparent from the harm at which it is directed . . . ," *i.e.*, "imminent and substantial danger" to health or to the environment. *Id.* at 485. Thus, "Congress did not intend for a private citizen to be able to undertake a cleanup and then proceed to recover its costs under RCRA." *Id.* at 487.

In light of the foregoing, in Petitioner's civil suit to recover cleanup costs incurred as a result of Respondents' alleged negligence, the Maryland Court of Special Appeals held that "RCRA was not designed to protect private entities, like ARE, from economic harm." (App. 18). In other words, Petitioner was not "within the class of persons sought to be protected [by RCRA], *and the harm suffered [was not] of the kind which the statute was intended to protect.*" (App. 16 – 17, *quoting Atl. Mut.*, 323 Md. at 124).

According to Petitioner, by reaching this conclusion the Maryland Court of Special Appeals not only ignored a number of federal appellate decisions imposing criminal liability on corporate officers under RCRA, but itself acted improperly "in finding no duty on the part of Respondents." (Petition p. 19).

> We have been unable to find any court of appeals that has endorsed the remarkable notion that a company that abandons materials that constitute hazardous waste has no duty to label them, to store them properly, and, pursuant to a waste manifest, to arrange for their transport to a permitted hazardous waste

> treatment or disposal unit for their proper disposition.

(Petition p. 15). Indeed, the "remarkable notion" has not been endorsed by any Maryland appellate court in this case either.

In fact, the Court of Special Appeals' analysis of the tort implications of RCRA reflects a reasoned approach applying the general principle that "whether or not the Plaintiff can assert a cause of action based on negligence *per se* [by referring to a statute] is an issue akin to whether a private cause of action exists under a statute." *325-343 E. 56th Street Corp. v. Mobil Oil Corp.*, 906 F. Supp. 669, 688 (D. D.C. 1995), *citing Frederick v. Thomas*, 578 F.2d 513, 517 (3rd Cir. 1978); *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 857 F. Supp. 838, 848 (D. N.M. 1994).

> The United States Court of Appeals for the Third Circuit has noted, most formulations of the standards for implying a private cause of action center on the presence or absence of a legislative intent to impose civil liability. In theory, at least, application of the negligence *per se* doctrine represents a judicial policy judgment independent of legislative intent with respect to the imposition of civil liability. Both, however, address the question of whether the policy behind the legislative enactment will be appropriately served by using it to impose and measure civil damage liability.

Id., 906 F. Supp at 688, *citing Frederick*, 578 F.2d at 517 n. 8.

The court in *325-343 E. 56th Street Corp.* addressed the issue under RCRA in the same manner that the Court of Special Appeals addressed it in this case. It reached the same conclusion:

> [T]he court determines that RCRA does not have the specific purpose of protecting a particular class of people. It was enacted to protect the public from soil and water contamination, not to protect a certain class of persons seeking to recover monetary damages. None of the RCRA provisions indicate that the class of persons to be protected is any less broad than the entire population of the United States. Therefore, allowing Plaintiff to proceed with its negligence *per se* claim would be improper.

Id.

Furthermore:

> Having found no express or implied private cause of action for money damages under RCRA, and finding a Congressional intent that the RCRA citizen suit provisions serve only to allow private plaintiffs to act as "private attorney generals," the court determines that Plaintiff's negligence *per se* claim for violations of 42 C.F.R. Pts. 280-81 should be dismissed.

Id.

In fact, it appears to Respondents that every court that has addressed RCRA's use in private civil damages actions has concluded that the statute cannot be used to establish a civil duty owed to a private litigant. *See, Short v. Ultramar Diamond Shamrock,* 46 F. Supp.2d 1199, 1201 (D. Kan. 1999) ("Plaintiffs cannot use the theory of negligence per se to bootstrap a private cause of action for damages when one is not provided by the RCRA. Accordingly, the court concludes that plaintiffs' negligence per se claim for violations of 42 U.S.C. §§ 6901, *et seq.* should be dismissed."); *See also, Abreu v. U.S.,* 468 F.3d 20, 32 (1st Cir. 2006) (Because RCRA explicitly does not provide for private damage actions, "a damage action under the [Federal Tort Claims Act] is not available against the Navy, based on a RCRA violation."); *Avondale Fed. Savings Bank v. Amoco Oil Co.,* 170 F.3d 692 (7th Cir. 1999) (RCRA violations will not support a private cause of action for "restitution"); *Waste, Inc. Cost Recovery Group v. Allis Chalmers Corp.,* 51 F. Supp.2d 936 (N.D. Ind. 1999) (RCRA violations will not support a private cause of action for "contribution"); *Davenport v. Neely,* 7 F. Supp.2d 1219 (M.D. Ala. 1998) (RCRA violations will not support a private cause of action for "indemnity" and "contribution"); *Cross Oil Co. v. Phillips Petroleum Co.,* 944 F. Supp. 787, 789 (E.D. Mo. 1996) (RCRA violations will not support a claim for "strict liability" in respect of past cleanup costs).

In sum, there is no conflict between the ruling of the Maryland Court of Special Appeals and the many federal appellate courts that have imposed criminal responsibility on corporations and corporate officials under RCRA. The Court of Special Appeals never

reached the issue that forms the ostensible basis for the Petition. Instead, the Court of Special Appeals decided, in a manner that represents the logical extension of this Court's ruling in *Meghrig*, that the regulatory scheme embodied in RCRA does not provide a framework for the assertion of tort duties owed to a private litigant, or a proper basis for seeking monetary damages arising out of alleged negligence.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss or deny the Petition by ARE Acquisitions, LLC for a writ of certiorari to the Court of Appeals of Maryland.

Respectfully submitted,

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